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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 369

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BUFFALO PITTS COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED OCTOBER 23, 1912.

(28408.)

# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1912.

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## No. 828.

## THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

## BUFFALO PITTS COMPANY.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

# United States Circuit Court.

WESTERN DISTRICT OF NEW YORK.

1

BUFFALO PITTS COMPANY,
*Plaintiff.*

AGAINST

UNITED STATES OF AMERICA,
*Defendant.*

Petition.

2 To the Honorable Judges of the Circuit Court of the United States for the Western District of New York:

The petition of the Buffalo Pitts Company, by its attorneys, Messrs. White & Babcock, respectfully shows upon information and belief:

FIRST: That your petitioner, the Buffalo Pitts Company, is a domestic corporation duly created and organized under the laws of the State 3 of New York, that its full name is as aforesaid and that its residence, so far as such corporation may have a residence, and its principal place of business is at the corner of Fourth and Carolina Streets, in the City of Buffalo and State of New York.

4 SECOND: That your petitioner makes claim against the Government of the United States and brings its suit pursuant to the provisions of an Act of Congress, approved March 3, 1887, and the acts amendatory thereof, which claim is founded upon the facts hereinafter stated, and the contract arising therefrom and is brought to recover damages in a case not sounding in tort.

5 THIRD: That prior to the 20th day of May, 1905, your petitioner was the owner of a valuable engine which it had manufactured for sale, to wit.: a Buffalo Pitts 22 horse-power double cylinder, special traction engine, No. 6659, with the usual appurtenances and equipment, and that on or about said 20th day of May, 1905, your petitioner delivered said engine to the Taylor-Moore Construction Company at or near the town of Ros-
6 well, in the County of Chaves, and Territory of New Mexico, under an agreement of sale by the terms of which the said Construction Company executed and delivered to your petitioner a chattel mortgage upon said engine and appurtenances as security for part of the purchase price thereof in the amount of sixteen hundred dollars ($1,600.00) payable in instalments with interest as set forth in said mortgage, which expressly pro-
7 vided, among other things, that if default should be made in the payment of said sum of money or the interest thereon, or if said mortgagee should at any time deem itself unsafe or insecure, the whole amount should be considered immediately due and payable, and your petitioner was

authorized to take and remove said property and 8
hold or sell and dispose of the same and all equity
of redemption as more fully set forth in said
mortgage, a copy of which is hereto annexed and
made part of this petition.

That on or about the 22nd day of May, 1905,
at 9:30 A. M., the said chattel mortgage was duly
filed for record and recorded in the office of the
Probate Clerk and ex-officio Recorder in and for
the said County of Chaves and Territory of New 9
Mexico, and thereby due notice was given accord-
ing to law unto the Government of the United
States and all persons interested in respect to
the rights of your petitioner in said property.

That within a few days thereafter the said
engine was put to work by said Taylor-Moore
Construction Company upon the so-called Hondo
Project being part of the Reclamation Service
undertaken by the Department of the Interior of 10
the United States which work was being prosecut-
ed under a contract between the United States
and said Taylor-Moore Construction Company,
dated December 4, 1904.

That the said Construction Company on or
about the 7th day of June, 1905, having become
insolvent, assigned to the United States all its
interest in said contract, and the United States
on that date took possession of all material, sup- 11
plies and equipment belonging to said Construc-
tion Company, including the aforesaid engine and
appurtenances, under the provisions of said con-
tract, but subject to the rights reserved to your
petitioner by said chattel mortgage.

That the said mortgagor thereby and by its other acts and omissions in the premises made default in the conditions of said mortgage, and the mortgagee thereby was rendered and deemed itself unsafe and insecure in respect to the money owing for such property, and so became entitled to the possession thereof, and thereupon your petitioner lawfully demanded from the United States through its proper representatives the return of said engine to your petitioner, but the representatives of the United States being desirous of continuing the use of said engine in the completion of said work, refused said demand and put off the return of said engine, at the same time stating to your petitioner's agent that in their opinion the Government would do what was right in the matter, and within a few days either give up possession or pay your petitioner what was due upon the engine.

That relying upon such representations your petitioner waited until the month of September, 1905, when an agent of your petitioner was sent to said town of Roswell, N. M., with instructions to take the property in charge and advertise and sell it in the manner provided by the mortgage, and upon arrival at said place said agent had an interview with the representative of the Government having the matter in charge, who requested that no action be taken looking to the recovery of the property, but that it be permitted to remain in the use of the Government in order to accomplish the work which had been left undone by the

Construction Company, and represented that if 16
the Government were permited to use it the Government would pay for the property, because its use was necessary and probably indispensable in the work to be done.

That accordingly your petitioner complied with said request and permitted said property to remain in the possession of the Government, and the same was used by the Government in the completion of said work, and was not returned 17
to your petitioner until on or about the 21st day of June, 1906.

That the fair market value of said engine and appurtenances at the time it was taken by the Government as aforesaid was eighteen hundred and twenty dollars ($1,820.00) and the fair market value of the same property when returned by the Government to your petitioner as aforesaid was not more than five hundred dollars ($500.00). 18
That the fair and reasonable value of the use and occupation of said property in the meantime was thirteen and twenty dollars ($1,320.00) and by reason of the facts stated your petitioner has suffered damage in said amount, with interest thereon from June 21, 1906, no part of which has been paid.

That the said Taylor-Moore Construction Company made default in respect to each and every 19
payment required by said chattel mortgage and no part thereof has been paid.

Wherefore, your petitioner prays for judgment upon the facts and law and for a recovery

20 against said United States of the sum of thirteen hundred and twenty dollars ($1,320.00) with interest at eight per cent. (8%) from June 21, 1906, besides the costs and disbursements of this action.

BUFFALO PITTS COMPANY,
*Petitioner.*

By WHITE & BABCOCK,
21 *Attorneys for Petitioner,*
Office and P. O. Address
100 Erie Co. Bank Bldg.,
Buffalo, N. Y.

STATE OF NEW YORK,
COUNTY OF ERIE,
City of Buffalo, } ss.:

22 CHARLES M. GREINER, being duly sworn says that he is an officer of the above-named petitioner, Buffalo Pitts Company, namely its president, that the foregoing petition is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHARLES M. GREINER,
23

Subscribed and sworn to before me
this 28th day of June, 1910.

JENNIE W. RUSSELL,
*Notary Public.*

## CHATTEL MORTGAGE.

## TAYLOR-MOORE CONSTRUCTION COMPANY TO BUFFALO PITTS COMPANY.

This indenture made and entered into this.... day of May in the year one thousand nine hundred and five by the Taylor-Moore Construction Company of the Town of Roswell, County of Chaves, Territory of New Mexico, mortgagor, to Buffalo Pitts Company, a body corporate under the laws of the State of New York, mortgagee, Witnesseth, that the Mortgagor being justly indebted to the Mortgagee in the sum of sixteen hundred no/100 dollars, which sum is hereby confessed and acknowledged to be due and payable by the Mortgagor to the Mortgagee, over and above all offsets and counterclaims, have for the purpose of securing the payment of said debt or debts, granted, bargained, sold, and mortgaged, and by these presents do grant, bargain, sell, and mortgage unto the said mortgagee, its successors and assigns, all that certain personal property described as follows; to wit, also One Buffalo Pitts 22 H. P. Special Traction Engine, Complete, shop number 6659, with main drive belt, trucks, hose, and all fixtures and appendages with or belonging to the same, which said above described property at the date these presents, is in possession of said party of the first part, and is now situated in the Town of Roswell, County of Chaves, Territory of New Mexico, and is free of all liens, conveyances, incumbrances, and levies,

and so stated this day, all the said property being now in the possession of said Mortgagor, in the County of Chaves and State aforesaid, and free from all incumbrances. To have and to hold all and singular, the personal property aforesaid, forever, as security for the payment of the notes and obligations hereinafter described. Provided, always, and these presents are upon this express condition, that if the said Mortgagor shall pay or cause to be paid unto the Mortgagee, its successors or assigns, the sum of sixteen hundred no/100 dollars according to the conditions of seven certain promissory notes payable to the Buffalo Pitts Company, viz:

One note dated May, 1905, due June 20, 1905, for $250.00 and interest.

One note dated May, 1905, due July 20, 1905, for $250.00 and interest.

One note dated May, 1905, due August 20, 1905, for $250.00 and interest.

One note dated May, 1905, due September 20, 1905, for $250.00 and interest.

One note dated May, 1905, due October 20, 1905, for $250.00 and interest.

One note dated May, 1905, due November 20, 1905, for $250.00 and interest.

One note dated May, 1905, due December 20, 1905, for $100.00 and interest.

And any and all renewals and extensions thereof, in which is stipulated that if not paid when

due, then it shall become due and payable at Hous- 32
ton, Harris County, Texas, and which is the ob-
ject of this Mortgage to secure, and shall perform
and fulfill the conditions herein contained, then
these presents to be void and of no effect, but if
default shall be made in the payment of said sum
of money or the interest thereon, at the time the
said notes shall become due, or if any attempt
shall be made to dispose of or injure said prop-
erty or to remove said property from said County 33
of Chaves, or any part thereof, by said Mortgagor
or any other person, or if said Mortgagor does
not take proper care of said property, or if said
Mortgagee shall at any time deem itself unsafe
or insecure, then the whole amount of said money
in said notes mentioned which shall not have been
paid, shall be considered immediately due and
payable, and the said party of the second part
its successors or assigns, shall have right and be 34
entitled to declare all of said notes due and pay-
able, anything in said notes to the contrary not
withstanding, and then, thereupon and thereafter,
it shall be lawful, and the said Mortgagor hereby
authorizes said Mortgagee, its successors or as-
signs, or its or their authorized agent, to take said
property and enter on the premises wherever the
same be found, to take and remove the same, and
hold or sell and dispose of the same and all equity 35
of redemption at public auction, with notice as
provided by law, and on such terms and at such
places as said Mortgagee or its agent may see
fit, and said Mortgagee may become the purchaser
of said property at sale, retaining such amount

as shall pay the aforesaid notes and interest thereon, and an attorney fee of fifteen dollars and all charges, costs expenses of pursuing, searching for, taking, removing, storing, and selling said described property, returning the surplus money, if any there may be, to the said Mortgagor, or his assigns, and the said Mortgagor hereby waives demand and personal notice of the time and place of sale. And it is further provided and agreed, that if the proceeds of said sale after all expenses as above specified shall have been fully paid, do not amount to a sufficient sum necessary to cancel the whole debt and interest thereon, then and in that case the said Buffalo Pitts Company are hereby authorized and empowered to endorse amount on any or all notes representing said debt, as they in their judgment may elect to do and the said parties of the first part hereby waive any appraisement and any and all relief from any valuation or appraisement laws.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

The Taylor-Moore Construction Co. (Seal)

By J. Will Gilliam, (Seal)

TERRITORY OF NEW MEXICO, }
County of Chaves. } ss:

Before me the undersigned authority, a notary public within and for the County and State aforesaid, duly commissioned and qualified, personally

appeared J. Will Gilliam, Secretary-Treasurer of 40
the Taylor-Moore Construction Company, personally known to me to be the same person whose name is subscribed to the foregoing and within instrument of writing and acknowledged to me that he executed the same freely and voluntarily for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office, this 41
20th day of May, A. D., 1905.

(Name) SUDYE J. SMITH.
(Title of office) *Notary Public*,
(Notarial Seal) Chaves County, N. M.

Filed for record, May 22nd, 1905, at 9:30 A. M., F. P. Gayle, Recorder, by R. F. Ballard, Deputy.

42

TERRITORY OF NEW MEXICO,
COUNTY OF CHAVES. } ss:

I, F. P. Gayle, Probate Clerk, and ex-officio Recorder, in and for the County of Chaves and Territory aforesaid, do hereby certify that the annexed copy of chattel mortgage recorded in chattel mortgage record J, at pages et seq., records of Chaves County, N. M., is true and literal exemplification from the record in this office. Wit- 43
ness my hand and seal of office on this the 23rd day of June, 1905.

F. P. GAYLE,
*Probate Clerk and Ex-officio Recorder.*
By R. F. BALLARD, *Deputy.*

44 UNITED STATES CIRCUIT COURT,

WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff*,

AGAINST

THE UNITED STATES OF AMERICA,
*Defendant*.

Answer.

45

The United States of America, by John Lord O'Brian, United States Attorney in and for the Western District of New York, upon its information and belief, answers the petition of the plaintiff herein as follows:

I. Admits that the Buffalo Pitts Company, the
46 plaintiff herein, is organized and has its place of business as in said petition set forth; that the Taylor Moore Construction Company had a certain contract with the United States of America, the defendant herein, through its Department of Interior, for certain reclamation work in the Territory of New Mexico; that on or about June 7th, 1905, the United States of America suspended the Taylor Moore Construction Company from
47 Work on and under such contract and took possession of all supplies, materials and equipments of said Company then on said work, including the so-called Buffalo Pitts' engine mentioned in said petition, pursuant to the provisions of the contract aforesaid and thereupon and thereafter completed

the work thereunder by and with the use, aid and 48
assistance of the said supplies, materials and
equipments, including the said engine.

2. Denies that it has any knowledge or information sufficient to form a belief as to any matters or things in said petition alleged or contained not hereinbefore specifically admitted.

Wherefore, the said defendant demands judg-
ment dismissing the petition of the plaintiff here- 49
in, with costs.

Dated Buffalo, N. Y., October 26th, 1910.

THE UNITED STATES OF AMERICA,
*Defendant and Respondent,*

By John Lord O'Brian,
*United States Attorney* in and
for the Western District of 50
New York,
405 Federal Building,
Buffalo, N. Y.

Western District of New York, }
STATE OF NEW YORK, } ss.:
County of Erie. }

51

John Lord O'Brian, being duly sworn, deposes and says: That he is the Attorney of the United States in and for the Western District of New York; that he has read the foregoing answer and knows the contents thereof; that the same is true

52 of his own knowledge, except as to the matters therein stated to be upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent, and not by the United States of America, is that the said United States of America is a sovereign corporation.

53 JOHN LORD O'BRIAN.

Sworn to before me this
26th day of October, 1910.

LEROY N. KILMAN,
*Notary Public*
in and for Erie County, N. Y.

54

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UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff,*
AGAINST
55 UNITED STATES OF AMERICA,
*Defendant.*
} Decision and Finding.

The issues of fact coming on to be tried by the Court at a regularly appointed term held by the

undersigned, without a jury and having been tried 56
on the 9th day of February, 1911, and the allegations and evidence of the parties having been heard; now, after hearing White & Babcock for the plaintiff and William Palmer, Esq., for the defendant, and due deliberation having been had, I decide and find as follows:

I. That the plaintiff, Buffalo Pitts Company, is and was at all the times mentioned in the petition and complaint a corporation organized under the laws of the State of New York, having its principal place of business at the City of Buffalo, N. Y., and being engaged in the manufacture and sale of agricultural implements and other machinery, including traction engines and their appurtenances. 57

II. That on or about May 20, 1905, the plaintiff sold and delivered to the Taylor-Moore Construction Co. at Roswell, New Mexico, where it had its principal place of business, a Buffalo Pitts 22 horse-power traction engine, shop No. 6659, with the appurtenances, for the price of $1,820 and then and there took back a chattel mortgage from said Taylor-Moore Construction Co. to secure the payment of $1,600 of the purchase price, receiving in addition $145.40 in cash, and the said Construction Company paying freight charges for the transportation of said engine amounting to the balance. 58 59

III. That said chattel mortgage conveyed said engine and property to the plaintiff upon condi-

60 tion that if the said mortgagor should pay the sum of $1,600 according to the conditions of seven certain promissory notes payable to the Buffalo Pitts Company, the first of which became due June 20, 1905, and should perform and fulfill the conditions therein contained, then the said indenture should be void and of no effect, but if default should be made in payment as aforesaid, or if any attempt should be made to dispose of or
61 injure said property or to remove said property from said County of Chaves or any part thereof, by said mortgagor or any other person, or if said mortgagor should not take proper care of said property, or if said mortgagee should at any time deem itself unsafe or insecure, then the whole amount unpaid should be considered immediately due and payable, and then, thereupon and thereafter it should be lawful for the said mort-
62 gagee to take said property and enter on the premises wherever the same be found, to take and remove the same and hold or sell and dispose of the same and all equity of redemption at public auction with notice as provided by law. That said mortgage was duly filed for record in the office of the Recorder of said County of Chaves on May 22, 1905, at 9:30 A. M., and no part of the money thereby secured was ever paid to said mort-
63 gagee which has ever since been the owner and holder of said mortgage.

IV. That thereupon the said engine was put to work by said Taylor-Moore Construction Co. upon the so-called Hondo Project, being part of

the reclamation service undertaken by the Depart- 64
ment of the Interior of the United States which work was being prosecuted under a contract between said defendant and said Taylor-Moore Construction Co., the said engine being located at or near Roswell, New Mexico.

V. That the said Construction Company having made default in the performance of its said contract on or about the 7th day in June, 1905, 65
was suspended from work thereunder, and then assigned to the United States all its interest in said contract, and the United States on that day took possession of all material, supplies and equipment belonging to said Construction Company, including the said engine and appurtenances, pursuant to and under the provisions of said contract with the United States.

VI. That on or about the 16th day of June, 66
1905, at Roswell, New Mexico, the plaintiff by its agent made a demand upon the defendant through Wendell M. Reed, District Engineer of the Reclamation Service under the Department of the Interior, for the possession of said engine and appurtenances, which the defendant then and there refused, and thereafter the defendant retained and used said property in the work under 67
said contract until June 21, 1906.

VIII. That said Wendell M. Reed was during said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Ros-

68 well, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant by the Director of the U. S. Geological Survey to whom the Secretary of the Interior referred said matter, and by the Chief Engineer and Assistant Chief Engineer of the Reclamation Service under the direction of said Department, ratified and adopted the acts of said Wendell M. Reed, Dis-
69 trict Engineer, in respect to the possession of said engine and appurtenances.

VIII. That the value of said engine and appurtenances at the time of said demand and refusal was the sum of $1,674.60 and the value thereof when the defendant got through using the same as aforesaid was reduced to $500. That the engine was then in bad condition, stripped of many
70 of its parts and greatly worn.

IX. That no part of the said mortgage has ever been paid to the mortgagee and that the mortgagor has never made any claim to the property since the suspension and assignment of said contract to the defendant as aforesaid.

X. That during the use and occupation of the said engine and appurtenances by the defendant,
71 the plaintiff, to wit: on or about June 16, 1905, and also on or about September 30, 1905, notified the defendant of the execution and filing of said mortgage as aforesaid and that the plaintiff claimed the said property under the title thereby vested in it and claimed the right of possession

because of the default by the mortgagor in the 72
conditions thereof, and that the defendant at all said times well knew of the existence and filing of said chattel mortgage and did not at any time dispute the validity thereof, and on September 30, 1905, represented to the plaintiff that the defendant was using and would continue to use said engine in said work and that any legal proceedings to recover the possession thereof would be resisted and defeated by the defendant, and fur- 73
ther represented to the plaintiff that if said property were left in the defendant's possession its attorney would recommend payment by the defendant therefor.

XI. That the plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid and 74
consented to defendant's retaining possession of said property in expectation of receiving due compensation therefor.

XII. That the defendant after the completion of the work aforesaid surrendered the said property to the plaintiff, its fair and reasonable value at that time being $500 as aforesaid.

75

## CONCLUSIONS OF LAW.

I. That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defend-

76 ant and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co., and its assigns.

II. That after the aforesaid refusal by the defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property.

77

III. That the defendant is estopped by the conduct of its officers and representatives from denying that the said engine and its appurtenances were the property of the plaintiff.

IV. That the plaintiff is entitled to recover against the defendant the sum of $1,174.60, with interest thereon from June 21, 1906, together with
78 the costs and disbursements of this action.

Dated Buffalo, N. Y., February 27, 1911.

JOHN R. HAZEL,
*U. S. Judge.*

79

UNITED STATES CIRCUIT COURT, 80

WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff*,

AGAINST

UNITED STATES OF AMERICA,
*Defendant*.

Exceptions to Findings.

81

The above entitled action having been tried before the Honorable John R. Hazel, United States District Judge in and for the Western District of New York, on February 9, 1911, and the said Judge having thereafter and on February 27, 1911, made, signed and filed his decision and findings in writing, the United States of America, the defendant above named, hereby makes and files the 82 following exceptions to the decision and findings aforesaid:

1. The said defendant excepts to the finding contained in said decision and numbered "VI," in the words and figures following:

> "That on or about the 16th day of June, 1905, at Roswell, New Mexico, the plaintiff by its agents made a demand upon the de- 83 fendant through Wendell M. Reed, District Engineer of the Reclamation Service under the Department of the Interior, for the possession of said engine and appurtenances, which the defendant then and there refused.

84 and thereafter the defendant retained and used said property in the work under said contract until June 21, 1906";

and to each and every part thereof.

2. The said defendant excepts to the finding contained in said decision and numbered "VII," in the words and figures following:

85 "That said Wendell M. Reed was, during said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Roswell, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant by the Director of the U. S. Geological Survey to whom the Secretary of
86 the Interior referred said matter, and by the Chief Engineer and Assistant Chief Engineer of the Reclamation Service under the direction of said Department, ratified and adopted the acts of said Wendell M. Reed, District Engineer, in respect to the possession of said engine and appurtenances";

and to each and every part thereof.

87 3. The said defendant excepts to the finding contained in said decision and numbered "X," in the words and figures following:

"That during the use and occupation of the said engine and appurtenances by the defend-

ant, the plaintiff, to wit: on or about June 88
16, 1905, and also on or about September 30,
1905, notified the defendant of the execution
and filing of said mortgage as aforesaid and
that the plaintiff claimed the said property
under the title thereby vested in it and
claimed the right of possession because of the
default by the mortgagor in the conditions
thereof, and that the defendant at all said
times well knew of the existence and filing 89
of said chattel mortgage and did not at any
time dispute the validity thereof, and on Sep-
tember 30, 1905, represented to the plaintiff
that the defendant was using and would con-
tinue to use said engine in said work and that
any legal proceedings to recover the posses-
sion thereof would be resisted and defeated
by the defendant, and further represented to
the plaintiff that if said property were left in 90
the defendant's possession its attorney would
recommend payment by the defendant there-
for";

and to each and every part thereof.

4. The said defendant excepts to the finding contained in said decision and numbered "XI." in the words and figures following:

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"That the plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid and consented to defendant's re-

92 taining possession of said property in expectation of receiving due compensation therefor";

and to each and every part thereof.

The said defendant also excepts to the conclusions of law contained in said decision and findings as follows:

93 1. The said defendant excepts to the conclusion of law contained in said decision and numbered "I," in the words and figures following:

"That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defendant and was then entitled to the possession thereof as against the said mort-
94 gagor, the Taylor-Moore Construction Co., and its assigns";

and to each and every part thereof.

2. The said defendant excepts to the conclusion of law contained in said decision and numbered "II," in the words and figures following:

"That after the aforesaid refusal by the
95 defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property";

and to each and every part thereof.

92 taining possession of said property in expectation of receiving due compensation therefor";

and to each and every part thereof.

The said defendant also excepts to the conclusions of law contained in said decision and findings as follows:

93 1. The said defendant excepts to the conclusion of law contained in said decision and numbered "I," in the words and figures following:

"That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defendant and was then entitled to the possession thereof as against the said mort-
94 gagor, the Taylor-Moore Construction Co., and its assigns";

and to each and every part thereof.

2. The said defendant excepts to the conclusion of law contained in said decision and numbered "II," in the words and figures following:

"That after the aforesaid refusal by the
95 defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property";

and to each and every part thereof.

3. The said defendant excepts to the conclu- 96
sion of law contained in said decision and numbered "III," in the words and figures following:

> "That the defendant is estopped by the conduct of its officers and representatives from denying that the said engine and its appurtenances were the property of the plaintiff";

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and to each and every part thereof.

4. The said defendant excepts to the conclusion of law contained in said decision and numbered "IV," in the words and figures following:

> "That the plaintiff is entitled to recover against the defendant the sum of $1,174.60, 98
> with interest thereon from June 21, 1906, together with the costs and disbursements of this action";

and to each and every part thereof.

Dated Buffalo, N. Y., April 25, 1911.

JOHN LORD O'BRIAN, 99

*United States Attorney* in
and for the Western District
of New York.

100 UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff*,
AGAINST
UNITED STATES OF AMERICA,
*Defendant*.
} Judgment.

101

The issues in this action having been regularly brought on for trial before Hon. John R. Hazel, District Judge, without a jury, at a Trial Term of this Court, held on the 9th day of February, 1911, at the Federal Building in the City of Buffalo, in the Western District of the State of New York, and the respective parties appearing by
102 their attorneys, and the court having heard the allegations and proofs of the parties, and after due deliberation having duly made and filed its decision of the 28th day of February, 1911, containing a statement of the facts found and the conclusions of law thereon and directing judgment as hereinafter stated, and the plaintiff's costs having been duly adjusted at fifty-four and no/100 dollars,

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Now, on motion of WHITE & BABCOCK, attorneys for the plaintiff, it is adjudged that the plaintiff recover against the defendant the sum of eleven hundred seventy-four and 60/100 dollars, with interest thereon from June 21, 1906, amounting to

fifteen hundred four and 85/100 dollars damages, 104
together with fifty-four and no/100 dollars ($54.00) costs, in all the sum of fifteen hundred fifty-eight and 85/100 dollars ($1,558.85). Judgment filed, docketed and entered this 28th day of February, 1911, at 4.05 P. M.

(Signed) HARRIS S. WILLIAMS,
*Clerk.*

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UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff,*
AGAINST
UNITED STATES OF AMERICA,
*Defendant.*
} Bill of Exceptions. 106

BE IT REMEMBERED that on the 9th day of February, 1911, said day being one of the days of the November, 1910 term of said Court, before the Honorable John R. Hazel, United States District Judge, in and for the Western District of New 107
York, the above entitled action was moved for trial, without a jury, by the plaintiff therein appearing by Edward Payson White, Esq., one of its attorneys, and the defendant appearing by William Palmer, Assistant United States Attor-

ney, and that thereupon the following proceedings were had:

Mr. White on behalf of the plaintiff made an opening statement of the claim and case of the plaintiff, and the plaintiff to maintain the issues on its part introduced the following evidence, viz:

The plaintiff offered in evidence certified copy of the chattel mortgage made by the Taylor-Moore Construction Company to the Buffalo Pitts Company, which was received in evidence, marked Exhibit 1, and is as follows:

## CHATTEL MORTGAGE.

### *TAYLOR-MOORE CONSTRUCTION COMPANY TO BUFFALO PITTS COMPANY.*

This indenture made and entered into this —— day of May in the year One Thousand Nine Hundred and Five, by the Taylor-Moore Construction Company of the Town of Roswell, County of Chaves, Territory of New Mexico, Mortgagor, to Buffalo Pitts Company, a body corporate under the laws of the State of New York, Mortgagee, WITNESSETH, that the said Mortgagor being justly indebted to the said Mortgagee in the sum of sixteen hundred no-100 dollars, which sum is hereby confessed and acknowledged to be due and payable by the Mortgagor to the Mortgagee, over and above all offsets and counterclaims, have for the purpose of securing the payment of said debt or debts, granted, bargained, sold and mortgaged,

and by these presents do grant, bargain, sell and 112
mortgage unto the said mortgagee, its successors and assigns, all that certain personal property described as follows: to wit, also one Buffalo Pitts 22 H. P. Special Traction Engine, complete, shop number 6659, with main drive belt, trucks, hose and all fixtures and appendages with or belonging to the same, which said above described property at the date these presents, is in possession of said party of the first part, and is now situated in the 113
Town of Roswell, County of Chaves, Territory of New Mexico, and is free of all liens, conveyances, incumbrances and levies, and so stated this day, all the said property being now in the possession of said Mortgagor, in the County of Chaves and State aforesaid, and free from all incumbrances. To have and to hold all and singular, the personal property aforesaid, forever, as security for the payment of the notes and obligations hereinafter 114
described. Provided, always, and these presents are upon this express condition, that if the said Mortgagor shall pay or cause to be paid unto the Mortgagee its successors or assigns the sum of sixteen hundred no-100 dollars, according to the conditions of seven certain promissory notes payable to the Buffalo Pitts Company, viz:

One note dated May, 1905, due June 20, 1905, 115
for $250 and interest.

One note dated May, 1905, due July 20, 1905, for $250 and interest.

One note dated May, 1905, due August 20, 1905, for $250 and interest.

One note dated May, 1905, due September 20, 1905, for $250 and interest.

One note dated May, 1905, due October 20, 1905, for $250 and interest.

One note dated May, 1905, due November 20, 1905, for $250 and interest.

One note dated May, 1905, due December 20, 1905, for $100 and interest and any and all renewals and extensions thereof, in which is stipulated that if not paid when due, then it shall become due and payable at Houston, Harris County, Texas, and which is the object of this mortgage to secure, and shall perform and fulfill the conditions herein contained, then these presents to be void and of no effect, but if default shall be made in the payment of said sum of money or the interest thereon, at the time the said notes shall become due, or if any attempt shall be made to dispose of or injure said property or to remove said property from said County of Chaves, or any part thereof, by said Mortgagor or any other person, or if said Mortgagor does not take proper care of said property, or if said Mortgagee shall at any time deem itself unsafe or insecure, then the whole amount of said money in said notes mentioned which shall not have been paid, shall be considered immediately due and payable, and the said party of the second part, its successors or assigns, shall have the right and be entitled to declare all of said notes due and payable, anything in said notes to the contrary notwithstanding, and then, thereupon and thereafter, it shall

be lawful, and the said Mortgagor hereby author- 120
izes said Mortgagee, its successors or assigns, or its or their authorized agent, to take said property and enter on the premises wherever the same be found, to take and remove the same, and hold or sell and dispose of the same and all equity of redemption at public auction, with notice as provided by law, and on such terms and at such places as said Mortgagee or its agents may see fit, and said Mortgagee may become the purchaser of said prop- 121
erty at sale, retaining such amount as shall pay the aforesaid notes and interest thereon, and an attorney fee of fifteen dollars, and all charges, costs, expenses of pursuing, searching for, taking, removing, keeping, storing and selling said described property, returning the surplus money, if any there may be, to the said Mortgagor, or his assigns, and the said Mortgagor hereby waives demand and personal notice of the time and place 122
of sale. And it is further provided and agreed, that if the proceeds of said sale after all expenses as above specified shall have been fully paid, do not amount to a sufficient sum necessary to cancel the whole debt and interest thereon, then and in that case the said Buffalo Pitts Company are hereby authorized and empowered to endorse net amount on any or all notes representing said debt, as they in their judgment may elect to do 123
and the said parties of the first part hereby waive any appraisement and any and all relief from any valuation or appraisement laws.

124 IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

THE TAYLOR-MOORE CONSTRUCTION CO. (Seal)
By J. WILL GILLIAM,
*Secy. & Treas.* (Seal)

TERRITORY OF NEW MEXICO, }
125 COUNTY OF CHAVES. } ss.

Before me the undersigned authority, a notary public within and for the county and state aforesaid, duly commissioned and qualified, personally appeared J. Will Gilliam, Secretary-Treasurer of the Taylor-Moore Construction Company, personally known to me to be the same person whose name is subscribed to the foregoing and within
126 instrument of writing and acknowledged to me that he executed the same freely and voluntarily for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office, this 20th day of May, A. D., 1905.

Name, SUDYE J. SMITH,
(Title of office) *Notary Public,*
(Notarial Seal) Chaves County, N. M.

127 Filed for record May 22, 1905, at 9.30 A. M.

F. P. GAYLE,
*Recorder.*

By R. F. BALLARD,
*Dep.*

128

TERRITORY OF MEXICO,
COUNTY OF CHAVES. } ss.

I, R. F. BALLARD, Probate Clerk, and ex-officio Recorder, in and for the County of Chaves and territory aforesaid, do hereby certify that the annexed copy of chattel mortgage recorded in chattel mortgage record J. at pages et seq. records of Chaves Co., N. M., is true and literal exemplification from the record in this office. Witness my 129
hand and seal of office on this the 28th day of November, 1910.

R. F. BALLARD,

*Probate Clerk and Ex-officio Recorder.*

The plaintiff offered and read in evidence the following questions and answers from the deposition of Wendell M. Reed taken in the above en- 130
titled action:

Q. Were you in 1905 and 1906 employed as District Engineer of the Reclamation Service of the United States in the Territory of New Mexico?

A. I was.

Q. Did you then and there have charge of the work prosecuted by said Government 131
known as the Hondo Project?

A. I did.

Q. Did said Government on or about June 5th, 1905, suspend the operations of the Taylor-Moore Construction Company upon said work?

A. It did.

132 George Hockenhull — direct.

Q. Did you on or about June 5th, 1905, take possession for said Government of a 22 H. P. Buffalo Pitts traction engine and its appurtenances which were previously in the possession of the Taylor-Moore Construction Company?

A. About the date mentioned on behalf of the Government I took possession of all
133 machinery and equipment then in the possession of the Taylor-Moore Construction Company located on the property of the United States in the vicinity of the Hondo Project, including a Buffalo Pitts engine of about 22 H. P.

GEORGE HOCKENHULL, sworn as a witness for
134 the plaintiff, testified as follows:

"I live at Gainsville, Texas. In 1905 I resided there but was travelling for the Buffalo Pitts Company. I was travelling salesman and collector. The Texas office of the company was at Dallas. In June, 1905, I was instructed to go to Roswell, New Mexico, to see what could be done about collecting the claim of the Buffalo Pitts Company
135 against the Taylor-Moore Construction Company. We had been informed that they had failed financially. I arrived at Roswell, June 15, 1905. The next day I called at the office of W. M. Reed, who was in charge of the Government work there, and had a talk with him about our claim. At that time they had possession of the engine and Mr.

Reed gave me to understand that they intended 136
to keep it. I had a copy of our chattel mortgage with me. Mr. Reed understood about it. He knew it was on record in that county. In my conversation with Mr. Reed about our chattel mortgage against the Taylor-Moore Construction Company, I think he said he knew about the chattel mortgage and that it was recorded. We talked about it a number of times. He read to me from 137
the contract between the Government and the Taylor-Moore Construction Company regarding the right of the Government to take possession of all machinery on the Hondo Project and continue the work or get someone else to do it. They were trying at that time to get someone else to take up the contract. I said to him that I had been sent out there to take possession of the engine if I could not get pay for it. I said to him, "Mr. Reed, 138
what would you do if I should take legal proceedings to get possession of the engine?" Mr. Reed said, "I would be bound to exert all the power of the Government to retain it." I said I had made up my mind it was foolish for us to commence a litigation at that time at least. He said that it would only be a few days until the Government would do something about it, either surrender the engine or pay our claim. And never questioned 139
the right that we had to our pay, of deferred payment. At that time he said this, that he thought it would only be a few days until they would do something about it; that they had no idea of giving it up. He made no positive promise but he

140 thought it would only be a few days until the Government would instruct him to settle with us and retain the engine. They seemed to think it was necessary on the works and did not care to give it up. They had to carry on the work they were doing at that time, or get somebody else to take it up, take up the contract. He said that it would be decided within a few days whether the Govern-
141 ment would continue the work or get someone else to take it up; that if they could not get someone else to take it up, that they would finish the job themselves. I made a report to the plaintiff on my journey to Roswell and the result of my interview there. I made a report every night to the people I was working for, what I had been doing. I did not after that time receive any word from Mr. Reed or any other officer of the Govern-
142 ment as to any decision on their part. In September, 1905, I was instructed to go out there again. I arrived there the 20th or 21st of September and found conditions just about as I had left them. Several days after I arrived Mr. Llewellyn, United States Attorney, came. From Gainesville, Texas, to Roswell, N. M., it is about $16 or $18 railroad fare, 3 cents a mile. About five or six hundred miles. It is about six hundred
143 miles, I guess, or possibly a little more. On this second trip I saw Wendell M. Reed, the District Engineer. I saw him nearly every day. I was up in his office. I saw him several times. We talked the matter over every time I would meet him. Mr. Reed could do nothing. He said the

144 matter was in just the same shape as when I had been there before in June. He still thought the Government would pay for the engine. I finally decided to go back to Dallas or take some legal steps to do something about it and I consulted with some attorneys there. They told me the same thing that Mr. Reed had. They said that if we undertook to take the engine we would have to give a bond for twice the amount of our claim 145 and the Government would turn around and take it away from us again and go ahead. We would not be in any better condition at all than we were at the present time. Mr. Reed told me this and the attorneys I consulted confirmed it. It was Richardson, Reed and Harvey, I think the name of the law firm. They said the same thing, that that would be the condition we would get into if we tried to take the engine away from the Govern- 146 ment. I talked with Mr. Reed about how we were going to get our pay eventually; that was what I was after; trying to get the thing settled, trying to get the money for the Buffalo Pitts people. We did not care for the engine; we didn't want the engine really, but we, of course, as a last resort, consented to take it under the terms of the mortgage. The lawyers advised me that I was taking exactly the right course in doing what I 147 did, not to try to pile up more expense because it would be useless. That was their decision, and just make a lot of expense and be still in the same position that we were. The Government at that time was prosecuting the work on the Hondo Project. The engine was being used on the work.

148 Q. What did you say in your interviews with Mr. Reed in September about your wanting possession of the engine for the plaintiff?

A. Well, just about as I have stated. He understood well what I was there for.

Q. Well, but what did you tell him? Did you tell him that you wanted the engine?

A. Yes, sir.

149 Q. What did he say?

A. I told him we were tired of waiting for the Government to do anything about it. We wanted possession of it, to get what we could out of it; that they were wearing it out and doing nothing.

Q. What did he say to that?

A. He simply said as he had before, he wouldn't give it up.

150 Q. Did he refer to any other officer of the United States Government?

A. I told him that I thought I would leave. He asked me then to wait a few days, a day or two, I have forgotten just how many days. He said Judge Llewellyn would be there soon in two or three days; asked me to wait for him and I did. Judge Llewellyn was the United States District Attorney of that dis-

151 trict—Territory of New Mexico.

I met them together up in Mr. Reed's office.

Q. What occurred there?

Objected to by the defendant upon the ground that the United States Attorney had no authority to bind the United States to any contract or to

152 enter into any contractural relations in his representative capacity.

Objection overruled and exception to the defendant.

The Court: I think I ought to state in overruling the objection that I do not mean to bind myself to ruling now as a matter of law that the conversation of the United States Attorney was 153 binding upon the Government.

A. I asked Mr. Llewellyn what he thought would be the outcome of the thing; whether he thought there was any prospect of the Government to pay for the engine or not, and he and Mr. Reed both said that they thought our claim was just and would like to see us get our money; and then the Judge (Llewellyn) suggested that he would write a letter to the Department that day 154 suggesting a settlement, and later on the same day read me a copy of his letter.

Plaintiff offered and read in evidence the following extract from the letter of W. H. H. Llewellyn to the Attorney General, dated Roswell, New Mexico, September 30, 1905:

"In this connection I desire to call your 155 attention to the fact that the Buffalo Pitts Mfg. Co. furnished the Taylor-Moore Construction Co. with a traction engine of the value of $1,600, giving said Buffalo Pitts Mfg. Co. a chattel mortgage on same. The reclamation engineers are using this engine. The

156 Buffalo Pitts Company desire either to have the engine or make some arrangement whereby they may be paid for this sale, and the question is in the event of their attempting to replevy same and take it from the possession of the engineers, whether I should resist it or not. I take it that there could be a redelivery to the engineers and under Section
157 1001 R. S. would not be required to give a bond, and could probably keep possession of the engine for some time and thus enable the engineers to complete the reservoir in question. But would not this subject the Government to a suit which would result eventually in the Government having to pay for the engine. I will thank you to advise me what in your opinion would be the correct
158 position for me to take on this question.

Respectfully,

W. H. H. LLEWELLYN,
*United States Attorney.*
Post Office Address,
Las Cruces, N. M."

159 The later part of this letter, which has been read, was the part which Mr. Llewellyn read to me. I do not think he read me the first part, at any rate I do not remember it. I never received any communication from Judge Llewellyn or Engineer Reed as to the decision of the Government in the

matter of this engine. I waited several days for Mr. Reed to get a reply or get some word from Llewellyn, and he never got it. I left there in October some time. I made reports to the Buffalo Pitts Company of the interviews between me and Mr. Reed and Judge Llewellyn. I mailed four letters to the Buffalo Pitts Company at Dallas, Texas, dated September 28, 1905, September 29, 1905, September 30, 1905, and a second letter dated September 30, 1905. 160 161

*Cross-examination:*

I didn't know Mr. Reed before my first visit to Roswell. I didn't go there to see him. I did not go there to see the Construction Company; they were gone; they were out of the place, out of the country. They had some other project. I didn't know that before I went to Roswell. My errand was to see them, but when I got there I found they were gone. I found Mr. Reed in possession of the engine. He was trying to get someone to take up the work. He didn't know what would happen when I first talked with him. He said the Government had taken possession of everything on the work belonging to the contractor and that it would be his duty to use all the power of the Government to retain possession. My second visit was about three months later. The talk with Mr. Reed at that time was substantially the same as before. I never instituted any proceedings to recover possession of the engine. I have stated all that I can remember of my conversations with Mr. Reed and Mr. Llewellyn. 162 163

161 By the Court:

Q. Did you at any time say to Mr. Reed that you would institute proceedings to recover possession of the property?

A. I did; and asked him what he would do in case I did that. That was the time he said—

Q. What did he say, if anything, about knowing about the chattel mortgage?

165 A. Well, I don't know that I can give the exact words, but it was understood—we talked the matter over time and again about the chattel mortgage, and while we were talking about the chattel mortgage was the time that he drew out the agreement, or the substance of the agreement, with the Construction Company. Oh, no, he did not ask 166 me not to commence proceedings, but he said—gave me to understand that that was his duty, and I think it was my evidence, that he showed me that it was his duty to hold the engine in spite of anything that I could do, that he would do that; it was his duty to the Government to do that.

To Mr. Palmer:

167 Well, I can't say that he did say at any time that he was acting under instructions from his department, but he certainly was acting under instructions, because he had sole charge of the whole thing. I don't know that he ever did state that he was—he was certainly boss of the ranch there. No one else had any say-so.

168 JOHN B. OLMSTED, sworn as a witness for the plaintiff, testified as follows:

In 1905 I resided in Buffalo and was the Secretary and attorney of the plaintiff. I am an attorney and counsellor at law of this state and have been such since 1879. It was part of my duty in 1905 to advise the Buffalo Pitts Company with reference to its claims and collections. In June, 169 1905, I learned that a traction engine which had been sold by us to the Taylor-Moore Construction Company had been taken possession of by the United States Government. The principal office of the company at that time was in Buffalo. We had a branch office in the City of Dallas, Texas. Our salesman in Texas reported to the Dallas office and the Dallas office reported in turn to the main office. That was the usual course. Con- 170 cerning this traction engine that I have mentioned we had several reports from Dallas from time to time, letters, and most all of the letters I think at that time. Our manager was at that time in Dallas and had not made his visits to the home office. In June, 1905, I know that Mr. Hockenhull was in the employ of the Buffalo Pitts Company in Texas. I couldn't testify exactly as to the first reports that were received in June, how they came, 171 whether they came to me direct—a copy of Hockenhull's reports, or whether they came in a letter from the manager at that time. We had, and have now, a practice at the Pitts Company of making what we call a slip of a claim. It contains briefs of all letters and information of any

172 kind that is either sent out from the home office, or is received by the home office, in regard to this particular claim. I have the slip of this claim here from which I refresh my recollection. I am of the impression that the first information in regard to the Government's having taken the engine, came in a communication from Mr. Batcheller, our manager there, written at Dallas, direct to
173 us. We did receive information of this transaction at that time. On June 30th, 1905, the Pitts Company wrote a letter to the Secretary of the Interior; this is a copy of the letter.

Plaintiff offered and read in evidence the letter which is as follows:

"June 30th, 1905.

Dear Sir:

174 On the 20th of May, 1905, we sold to the Taylor-Moore Construction Company of Roswell, New Mexico, one of our Buffalo Pitts 22 horse power double cylinder special traction engines. Shop No. 6659, with main drive belt, trucks, hose and all fixtures and appurtenances with or belonging to the same. The purchase price of said machinery was $1,600, represented by seven notes, each dated May 20th, 1905, due as follows:

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| | |
|---|---|
| June 20th, 1905..... | $250.00 |
| July 20th, 1905..... | 250.00 |
| Aug. 20th, 1905..... | 250.00 |
| Sept. 20th, 1905..... | 250.00 |
| Oct. 20th, 1905..... | 250.00 |
| Nov. 20th, 1905..... | 250.00 |
| Dec. 20th, 1905..... | 100.00 |

Interest at 8% on each note from date. These notes were secured by a chattel mortgage bearing even date with the date of the notes, and covering the machinery above described. The machinery was delivered by us to the Taylor-Moore Construction Company at Roswell, New Mexico, and was put in operation on some work which they were doing there under a contract with the United States Government. We understand from reports received that the Government has taken over this work and has declared the contract of the Taylor-Moore Construction Company void. We understand further that the Government are continuing the work, and are making use of the engine in connection therewith; also that matters are in more or less mixed up condition concerning the contract, and that the officers of the Federal Government are now engaged in straightening matters out and determining what rights the various creditors of the Taylor-Moore Construction Company have in connection with the matter.

176 177 178

"We desire to state our position to you in order to have it properly understood. We understand that the engine above referred to is necessary to the work, and if the work is continued by the Government, will probably be used by it in the future. Under the terms of our mortgage, we suppose that we are entitled to the possession of our property, but we have of course no objections to leaving it

179

180 on the work, provided reasonable assurance of ultimate settlement for it can be given.

"Will you kindly advise us what, if anything, more is necessary for us to do in the premises, and indicate, if possible, the action of the Government in connection with our claim above set forth. We have a certified copy of our chattel mortgage, and can submit

181 it if it is necessary.

Yours truly,

BUFFALO PITTS COMPANY.

*The Honorable Secretary of the Interior,*

Washington, D. C."

I have the reply to this letter, dated August 2,

182 1905.

Plaintiff offers and reads in evidence such reply, as follows:

"Subject: Engine furnished Taylor-Moore Co.,

Department of the Interior,
United States Geological Survey,
Washington, D. C., Aug. 2, '05.

183 Buffalo Pitts Company,
Buffalo, N. Y.

Gentlemen:—

Your letter of June 30, addressed to the Secretary of the Interior, has been referred to this office.

"You state that on June 20, you sold to the Taylor-Moore Construction Company a traction engine and delivered same to said company at Roswell, N. M., for use in prosecution of a contract with the United States; that the purchase price of said engine was $1,600, represented by several notes secured by chattel mortgage. The work under this contract having been taken over by the United States, you desire to ascertain what action the United States will take in connection with your claim. 184 185

"The contract referred to is no doubt the contract between the Secretary of the Interior and the said company for the construction of certain work in connection with the Hondo Project. Under the terms of said contract, in case of default by the contractor the United States is entitled to the possession of the contractor's machinery delivered on the ground and if the engine referred to was delivered, the United States has taken possession of it under the terms of the said contract. 186

"The remedy of those furnishing labor or materials used by contractors in the prosecution of contracts with the United States, appears to be set forth in the act of Congress approved February 24, 1905 (33 Stat., 811). 187

Very respectfully,

H. C. RIZER,

*Acting Director.*"

188 On August 22nd, 1905, the plaintiff replied to the letter of the Department of the Interior.

Plaintiff offers and reads in evidence this letter which is as follows:

"August 22d, 1905.

A. P. D.

*Engine furnished Taylor-Moore Co.*

189 H. C. Rizer, Acting Director,
Department of the Interior,
U. S. Geological Survey,
Washington, D. C.

Dear Sir:—

We are in receipt of your letter of Aug. 2d, 1905, and reference to the Statute passed in February in connection with claims against
190 the United States Government.

"We have made an examination of the statute. We have also received information from Roswell, New Mexico, where the work is being carried on, that the Government is using our engine, and that a bond filed by the Taylor-Moore Construction Company of $24,000, and that the full indebtedness is
191 about $50,000.

"Our claim is somewhat different from the ordinary claim of supplies furnished. As we have already informed you, we have a chattel mortgage on the engine, and whereas we are perfectly willing that the Government should keep the engine and use it, upon assurance

192 that it will be paid for, we cannot see that we should allow it to be used unless such assurance is given, and we do not see anything in the Statute which you have quoted to us which abrogates our right to foreclose our chattel mortgage and take the engine.

"We trust you understand our position in the matter, which is that we do not care to allow the engine to continue to be used and to 193 take our chances of the small percentage that is likely to be paid to the creditors of the Taylor-Moore Construction Co. May we ask that you will advise us what we may expect?

Yours truly,

BUFFALO PITTS COMPANY.

The Witness: I think, if I might be allowed 194 to make one statement there further in regard to that statute. I think that the statute requires that the United States Government shall first satisfy its own claim of every nature, and after that, if there is anything left, the creditors of the contractor may get it—the surplus.

We received a reply to our letter, under date of August 30th, 1905.

195

Plaintiff offers and reads in evidence letter dated August 30, 1905, as follows:

"Department of the Interior,
United States Geological Survey,
Reclamation Service.
Washington, D. C., Aug. 30, 1905.

196 The Buffalo Pitts Co.,
Buffalo, N. Y.

Gentlemen:—

Referring to your letter of August 22, 1905, in reference to your claim in connection with an engine furnished the Taylor-Moore Construction Co., under its contract with the Gov-
197 ernment for the construction work under the Hondo Project, New Mexico, you are advised that the matter has been referred to the Engineer in the field for a statement, on receipt of which you will be further advised.

Very truly yours,

A. P. DAVIS,
*Ass't. Chief Engineer.*"

198

After the receipt of this letter to which I have just testified I gave instructions for this man to go from Dallas to see whoever was in charge. We received a report from the Dallas office by Mr. Hockenhull going there on that mission.

We also received a letter from the Department of the Interior, under date of September 26th,
199 1905.

Plaintiff offers and reads in evidence letter dated September 26th, 1905, as follows:

"Department of the Interior,
United States Geological Survey,
Reclamation Service.
Washington, D. C., Sept. 26, 1905.

200

The Buffalo Pitts Co.,

Buffalo, N. Y.

Gentlemen:—

In reference to your letter of August 22, 1905, and to letter from this office of August 30, 1905, advising you that the matter of your claim in connection with an engine furnished the Taylor-Moore Construction Company, under its contract with the Government for construction work under the Hondo Project, New Mexico, was referred to the engineer in the field for a statement, you are advised that the engineer in charge reports that the engine was furnished and was in use upon the work before any instrument was filed showing title in any one other than the contractors. Upon default of the contractors, the Government under the terms of the contract which was in force at the time the chattel mortgage is said to have been filed, took possession of all the machinery, tools and appliances belonging to the contractor, upon the ground.

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202

"The status of the machinery in question is the same as that of other machinery, tools, stock, etc., belonging to the contractors and taken over by the government in pursuance of the express terms of the contract, and until the work is completed and matters under the contract are finally adjusted, no change

203

204 in the status of the machinery can be made nor claims thereto recognized.

Very truly yours,

F. H. NEWELL,
Chief Engineer."

Among the papers that I procured in support
205 of the claim filed, there was a statement from W. M. Reed, the Civil Engineer, dated June 4, 1908. (Paper shown to witness). This is a copy of the original on file in the Department of the Interior. It was a part of our claim that we filed with the Government.

Letter marked Plaintiff's Exhibit 14.

"*Pertaining to Contracts—Hondo Reservoir.*
206 Department of the Interior,
United States Geological Survey,
Reclamation Service.

Carlsbad, N. M., June 4th, 1908.

Buffalo Pitts Engine Co.,
c-o Mr. R. B. George,
Amarillo, Texas.

Messrs.:—
207

"Referring to your request by telephone for information concerning dates of contracts, etc., on Hondo Project, New Mexico:

"The Taylor Moore Construction Co. assigned to the United States their interest in their contract on the Hondo Project, on June

208

7, 1905, and the United States on that date took charge of all material supplies, and equipment belonging to them.

"The United States entered into contract with Wood, Bancroft & Doty to finish a part of the unfinished work of the Taylor-Moore Co., on November 13, 1905. Wood, Bancroft & Doty finished their contract on June 21, 1906. Since the last mentioned date the 209
Buffalo Pitts engine under discussion has not been used by the United States or any of its agents.

Yours very truly,

W. M. REED,
District Engineer."

210

No part of our chattel mortgage was ever paid; we took the engine back in 1906 at $500; we received a certain amount as proceeds of the sale of that engine after it came back into our possession; I knew the market value of the Buffalo Pitts engine in May and June, 1905.

Q. What was the value of this engine on May 20th, 1905, the day it was sold to the Taylor-Moore Construction Company?

211

Objected to by defendant as incompetent, immaterial and not the proper measure of damages in this case.

Objection overruled and exception to the defendant.

212 A. $1,820.00. That is the Houston price, and the freight was to be added to that, to put it in New Mexico. That was the contract. There was an understanding and agreement between the Pitts Company and the Government as to how we should proceed to ascertain the damages, if any, the Government should be liable for. I went to Washington in April, 1907, to see the Reclama-
213 tion officials; I saw Morris Bien, and we agreed that would be a fair way to determine what the use was, if the Government should pay for it at all: what the value of the engine was when it was put on the work and what a reasonable appraisal would say it was worth when they got through with it, would reasonably approximate what the Government ought to pay for it, if anything. This appraisal by Elzer D. Anderson was
214 made pursuant to that agreement at that time before we took it away.

*Cross-examination*:

The purchase price of the engine was $1,820.00; the Pitts Company received a down payment of $145.00, the difference of $75.00 was allowed to the Taylor-Moore Construction Company for freight
215 charges. I saw Morris Bien in Washington; he represented the Reclamation Service; I was referred to him as the man having charge of this matter; he was the Acting Director of the Department of the Interior; I was referred to him by Mr. Garfield, Secretary of the Interior. I had a talk with Secretary Garfield and he sent me to

various officers until finally I reached Mr. Bien; 216
I presented our case to Mr. Bien and told him the circumstances about as they have been detailed here in Court; he admitted that our case was a good one and he thought that the Government ought to pay for the engine, but he said it was a matter of law to be decided whether the Government was liable or not; he referred me to Mr. Tracewell of the Treasury, and I went over 217
and argued the matter with him. Mr. Tracewell who was a pretty good politician, I think, said he didn't propose to settle the troubles of the Reclamation Department, and I had better go back to it. I finally left the matter with the arrangement that I should present a statement of all the facts to Mr. Bien, and he would look it over and get some legal advice from someone of the counsel of his Department. I subse- 218
quently made such a statement and received the opinion that the Government was not legally liable. All the gentlemen that I talked with said that morally and equitably they thought the Government ought to pay for the engine, but the claim was rejected.

To the Court: The engine was left as those things usually are. They had gotten through 219
with it. Nobody was paying very much attention to it. We directed our people to go and get hold of it. We did not have any correspondence with anybody with reference to it, that I recollect. We simply went up there, I think. My recollection of it, Judge, was it was stored under the canopy of Heaven. It was a long ways from our

220 base of operations, and, as has been testified here, it would cost $75.00 or $100.00 to send a man up there, and we didn't send them any oftener than we could help.

The following affidavit of Elzer D. Anderson was offered and received in evidence, with the same effect as if it were a deposition duly taken herein:

221

AFFIDAVIT.

TERRITORY OF NEW MEXICO,
COUNTY OF CHAVES.

ELZER D. ANDERSON, Mechanical Engineer of Roswell, New Mexico, after being duly sworn upon his oath, states that he has carefully examined the twenty-two horse power traction engine formerly
222 sold by Buffalo Pitts Company to the Taylor-Moore Construction Company, and then attached by the United States Government, the same being now located at the Hondo Reservoir in and near the vicinity of Roswell, and finds that, according to the treatment the same has received, and taking into consideration its present location, it is worth the sum of $500.00, which, in his judgment, is a fair valuation of said engine.

223 E. ANDERSON.

Subscribed and sworn to before me
this 4th day of June, 1908.
(Seal)

ALTA HOLDEKER,
*Notary Public.*"

224 The plaintiff offers and reads in evidence the deposition of Augustus T. Renfroe, duly taken in this action, as follows:

I live at Amarillo, Texas; I am travelling salesman for the plaintiff; in 1905 I was a salesman and collector for it; in 1906 I called on W. H. H. Llewellyn, United States Attorney, at his office in Roswell, New Mexico; he had charge 225 of the controversy concerning this engine for the United States; I asked him for possession of this engine; I explained to him that the plaintiff had a chattel mortgage on it given by the Taylor-Moore Construction Company; he refused possession; he said the Government's engineer was in Washington and that he could not do anything until the engineer returned; I asked him to write me at Amarillo, Texas, whether or not I could 226 come down and get the engine; he said he would but that he felt sure I could not take possession of the engine until the matter went through the United States Courts; he never wrote me that I could get the engine; I wrote him regarding the matter and received a reply; I do not remember the exact words, but it was to the effect that I could not have possession of the engine. When I first saw this engine it was standing out on 227 open ground near Roswell, where it had been used in the construction of the Hondo Dam by the Government. I do not know just how long since it had been used, but it was badly eaten with rust, and had been robbed of its parts until nothing much was left but the wheels and boiler.

228 U. F. Short—deposition.

When I saw this engine in 1906, what was left of it, in my estimation, was not worth more than $350.

The plaintiff also offers and reads in evidence the deposition of U. F. Short, duly taken in this action, as follows:

I reside at Dallas, Texas; I am an attorney.
229 In 1905 I was consulted by the plaintiff regarding this engine; the plaintiff's manager in Texas consulted me with reference to the collection of the purchase money; he presented the notes and chattel mortgage and asked what steps should be taken for collection. We ascertained that the Taylor-Moore Construction Company was insolvent and that the Government had taken the work in charge together with all machinery, implements
230 and tools which had been used on the work. I told him to demand possession of the engine from the persons in charge; I advised the recovery of the mortgaged property; all I know about what was done with respect to my advice was what I was told; I did not come in contact with any United States officer in relation to the matter; I know nothing personally of the use or disposition of the engine by the Government, except what
231 was told me by the employees of the plaintiff.

The plaintiff then rested its case.

The defendant moved for a dismissal of the plaintiff's bill upon the following grounds:

1. That the plaintiff cannot recover herein because at the time of the taking over of

the engine by the defendant the plaintiff was not in possession and was not entitled to possession of the engine and had no right or authority to make or enter into any contract for its use. The remedy of the plaintiff was confined by the chattel mortgage to the sale of the mortgaged property and the application of the proceeds of such sale to the extinguishment of its debt. 232

2. That the proof of the plaintiff fails to establish any action of the defendant from which an implied promise to pay for the engine can be found or that those with whom the alleged conversations and transactions occurred had any authority to bind the defendant to any such contract or agreement. 233

3. That the Court has no jurisdiction of this suit. The bill is framed to recover for the reasonable value of the use of the engine under an implied contract to pay therefor, but the reasonable construction of all the evidence of the plaintiff tends to establish a wrongful retention of the engine following a lawful taking. 234

4. That there was no competent evidence or proof as to any damages sustained by the plaintiff. 235

The Court denied the motion of the defendant upon all the grounds stated and to such ruling of the Court the defendant duly excepted.

236 Wendell M. Reed — deposition.

The defendant offers and reads in evidence the deposition of Wendell M. Reed, duly taken in this action, as follows:

I reside at El Paso, Texas; I am a Civil Engineer; I am employed as District Engineer in the United States Reclamation Service for the District of Texas and New Mexico. In June, 1905,
237 I was in the Reclamation Service as engineer in charge of the Hondo Project, and continued in that position for a year thereafter, and I then lived at Roswell, New Mexico; my duties at that time in connection with the irrigation projects, were those of engineer in charge both of the engineering and local executive duties; I was then employed by the Department of the Interior, Bureau of Reclamation Service; my duties were
238 to supervise the construction of the Hondo and Carlsbad Projects and to be the local representative of the Reclamation Service there; in fact, I was the agent of the United States in all matters pertaining locally to these Projects. I am not positive that I have met Mr. Hockenhull, Mr. Short or Mr. Anderson, but have a recollection of meeting some representatives of the Buffalo Pitts Company, these people purporting to come
239 from somewhere in Texas; the name Hockenhull sounds familiar, and it is quite possible I did meet him, and have conversation with him upon matters pertaining to the Taylor-Moore Construction Company during the year 1905; I recollect meeting some representatives of the Buffalo Pitts Company and having conversations with them upon

matters pertaining to the Taylor-Moore Construction Company in 1905; I may have had such a conversation with Mr. Hockenhull; I do not recall any conversation with either of the others; I cannot give the time and place where such conversation occurred, but it must have occurred at Roswell, New Mexico, and it pertained to the transactions of the United States with the Taylor-Moore Construction Company; the Taylor-Moore Construction Company forfeited its contract with the United States for the construction of the Hondo Reservoir; there was considerable trouble in the matter due to claimants having claims against the Taylor-Moore Construction Company or interest in its business or equipment. It is my recollection that Mr. Hockenhull had an interview with me in regard to the claim of the Buffalo Pitts Company to some machinery which was in possession of the Taylor-Moore Construction Company when they forfeited their contract to the United States; if I remember correctly the conversation related to the traction engine claimed by the Buffalo Pitts Company under a mortgage held by it from the Taylor-Moore Construction Company; I don't know whether I had more than one conversation with Mr. Huckenhull or not; it is possible that I had more than one such conversation; I cannot give the exact words that passed between us, but remember that I took the position that being the agent of the United States my actions would be wholly controlled by the terms of the contract

244 between the United States and the Taylor-Moore Construction Company.

In answer to cross-interrogatories, this witness testified as follows:

In 1905 and 1906 I was District Engineer of the Reclamation Service of the United States in New Mexico; I did then and there have charge
245 of the work being prosecuted by said Government known as the Hondo Project; on or about June 5th, 1905, the United States suspended the operations of the Taylor-Moore Construction Company on the Hondo Project; on or about that date, on behalf of the Government, I took possession of all the machinery and equipment then in the possession of the Construction Company located on the property of the United States in the vicinity
246 of the Hondo Project, including the Buffalo Pitts engine; I do not remember of at any time delivering possession of that engine to the Buffalo Pitts Company; I do not remember any particular conversation with Mr. Hockenhull upon his asking me for possession of the engine, when I said I would not deliver it, but I stated to all claimants that I was acting entirely under the terms of the contract with the Taylor-Moore Con-
247 struction Company and would surrender no machinery or equipment which that contract permitted the Government to retain. I do not remember the particular statements of Mr. Hockenhull as to an amount being due to said Buffalo Pitts Company for the purchase price of said traction engine and its being secured by a chat-

248 tal mortgage on file in the Recorder's office of Chaves County, New Mexico, but do remember that each claimant asserted his perfect title, etc., and was in each case referred by me to the contract, and for any further recourse, to the Courts. I do not remember in particular whether Mr. Hockenhull claimed to have a chattel mortgage of record in the Recorder's office of Chaves County, or not; at that time I didn't know whether the 249 Government would continue the work or sublet the contract; it was optional with the Government which method should be followed; in fact, a portion of the work was done by the Government and another portion was sublet; I considered the traction engine useful in the work, but not absolutely necessary; I don't remember ever making a statement that it would be right for the Government to surrender possession of the en- 250 gine to the Buffalo Pitts Company or pay what was due; I do not recall a conversation with Mr. Hockenhull on that subject; the engine was used in the completion of the work after the Taylor-Moore contract was forfeited; possession and use of the engine were taken under the terms of the contract with the Taylor-Moore Construction Company, and I believe that the Government had a perfect right under the contract to retain and 251 use this engine as well as all other equipment formerly in possession of the Construction Company for the completion of the work embraced in its contract.

252 Defendant also offers and reads in evidence Chapter 1, Title 27 of the Laws of New Mexico, in force at the time of the execution and recording of the chattel mortgage, exhibit 1, particularly sections 2365, 2367 and 2368, as follows:

*Section* 2365:

"In the absence of stipulation to the contrary the mortgagor of real or personal prop-
253 erty shall have the right of possession thereof."

*Section* 2367:

"After condition broken, the mortgagee or its assignee may proceed to sell the mortgaged property or so much thereof as shall be necessary to satisfy the mortgage and cost
254 of sale; having first given notice of the time and place of sale, by written or printed handbills posted up in at least four public places in the precinct in which the property is to be sold at least ten days previous to the day of the sale."

*Section* 2368:

"If the mortgagee or his assignee shall
255 have obtained possession of the mortgaged property either before or after conditions broken, the mortgagor or any subsequent mortgagee may demand in writing a sale of such property. In such case the mortgagee shall proceed to sell the property having first

given the notice as provided in the preceding 256
section."

Defendant rests and evidence closed.

The defendant thereupon renewed its motion for dismissal of the bill in this suit upon the same grounds as were specified in this motion made at the close of plaintiff's evidence, and upon the further ground that as the taking of 257
the engine by the Government was a lawful taking, no action to recover will lie against the defendant. After argument by counsel the Court said: I think I will hold in this case that the Government, by its action through the engineer then in charge of the work, is estopped from claiming at this time that the plaintiff should have taken possession of this property and should have followed the legal remedy pointed 258
out by the statute. The Government, knowing that this chattel mortgage had been made to the mortgagee, took possession of the property and used the engine for a period of time, and when demand was made for the possession of it, the officer insisted that the Government would retain the possession of it notwithstanding anything that might be done by the plaintiff towards regaining possession, and the Government would hold it 259
and use it. They have held the machine; they have used it; they have had the benefit of it. I am inclined to think that I ought to permit the plaintiff to have judgment for the damages which they have shown. Now, the damages, as I under-

260 stand them, as claimed in the complaint, are the difference between the value of the engine at the time it was sold, subject to the payment of $145.50 which was made upon it, and the value as it was subsequently appraised after its use by the Government, namely $500.

The motion was denied upon all the grounds specified and the defendant duly excepted.

261 The Court thereupon made, signed and filed its findings of fact and conclusions of law and judgment was duly granted and entered herein in favor of the plaintiff and against the defendant for the sum of $1,504.85 damages, and $54.00 costs, amounting in all to the sum of $1,558.85.

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262 UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff*,

AGAINST

THE UNITED STATES OF AMERICA,
263 *Defendant*.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties to the above entitled action that the foregoing bill of excep-

tions, including the exhibits therein contained, 264
contains all the evidence produced and proceedings had upon the trial of the above entitled action, and that the same may be settled, allowed and filed.

Dated, Buffalo, N. Y., June 19th, 1911.

WHITE & BABCOCK,
*Attorneys for Plaintiff.*

265

JOHN LORD O'BRIAN,
*United States Attorney,*
in and for the Western District of New York, and attorney for the defendant.

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266

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff,*

AGAINST

THE UNITED STATES OF AMERICA,
*Defendant.*

267

The foregoing is all the evidence and proceedings had and taken upon the trial of the above

entitled action, and, inasmuch as the exceptions thereto do not appear of record,

IT IS HEREBY ORDERED, That this, the defendant's bill of exceptions herein, be, and the same hereby is, settled and allowed as hereinbefore set forth.

IT IS FURTHER ORDERED, That the said bill of exceptions may be filed nunc pro tunc as of the 9th day of February, 1911, and annexed to the judgment roll herein.

Dated, Buffalo, N. Y., June 27th, 1911.

JOHN R. HAZEL,
*United States District Judge.*

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UNITED STATES CIRCUIT COURT OF APPEALS—FOR THE SECOND CIRCUIT.

THE UNITED STATES OF AMERICA,
*Plaintiff-in-Error,*
AGAINST
BUFFALO PITTS COMPANY,
*Defendant-in-Error.*

Assignments of Error.

The United States of America, plaintiff-in-error (defendant in Court below), by John Lord O'Brian, United States Attorney in and for the

Western District of New York, alleges that in the 272
record and proceedings in this case and in the final judgment therein, there is manifest error in the following named and other particulars, viz:

1. The Court erred in receiving the testimony offered in behalf of the defendant-in-error by the witness, George Hockenhull, as to any conversation between the witness and W. H. H. Llewellyn, United States Attorney for New Mexico, tending 273
to establish any agreement that the United States would pay for the use of the engine mentioned by the witness, to the reception of which testimony the plaintiff-in-error duly objected.

2. The Court erred in receiving the testimony offered in behalf of the defendant-in-error by the witness, John B. Olmsted, as to the market value of the engine referred to by the witness, in the months of May and June, 1905, to the recep- 274
tion of which testimony the plaintiff-in-error duly objected.

3. The Court erred in denying the motion of the plaintiff-in-error made at the close of the proof of the defendant-in-error to dismiss the bill of complaint herein upon the ground that the defendant-in-error cannot recover herein because at the time of the taking over of the engine by the 275
plaintiff-in-error the defendant-in-error was not in possession and was not entitled to possession of the engine and had no right or authority to make or enter into any contract for its use. The remedy of the defendant-in-error was confined by

276 the chattel mortgage to the sale of the mortgaged property and the application of the proceeds of such sale to the extinguishment of its debt, and to which ruling of the Court the plaintiff-in-error duly excepted.

4. The Court erred in denying the motion of the plaintiff-in-error made at the close of the proof of the defendant-in-error to dismiss the bill
277 of complaint herein upon the ground that the proof of the defendant-in-error fails to establish any action of the plaintiff-in-error from which an implied promise to pay for the engine can be found or that those with whom the alleged conversations and transactions occurred had any authority to bind the plaintiff-in-error to any such contract or agreement; and to which ruling of the Court the plaintiff-in-error duly excepted.

278 5. The Court erred in denying the motion of the plaintiff-in-error made at the close of the proof of the defendant-in-error to dismiss the bill of complaint herein upon the ground that the Court has not jurisdiction of this suit. The bill is framed to recover for the reasonable value of the use of the engine under an implied contract to pay therefor, but the reasonable construction of all the evidence of the defendant-in-error tends
279 to establish a wrongful retention of the engine following a lawful taking; and to which ruling of the Court the plaintiff-in-error duly excepted.

6. The Court erred in denying the motion of the plaintiff-in-error made at the close of the

proof of the defendant-in-error to dismiss the bill of complaint herein upon the ground that there was no competent evidence or proof as to any damages sustained by the defendant-in-error; and to which ruling of the Court the plaintiff-in-error duly excepted. 280

7. The Court erred in denying the motion of the plaintiff-in-error made at the close of the case to dismiss the bill of complaint herein upon all of the grounds specified in the motion made at the close of the proof of the defendant-in-error and upon the further ground that, as the taking of the engine by the Government was a lawful taking, no action to recover will lie against the plaintiff-in-error; and to which ruling of the Court the plaintiff-in-error duly excepted. 281

8. The Court erred in making the finding or decision contained in its written decision and findings dated February 27th, 1911, and therein numbered "VI", in the words and figures following: 282

> "That on or about the 16th day of June, 1905, at Roswell, New Mexico, the plaintiff by its agent made a demand upon the defendant through Wendell M. Reed, District Engineer of the Reclamation Service, under the Department of the Interior, for the possession of said engine and appurtenances, which the defendant then and there refused, and thereafter the defendant retained and used said property in the work under said contract until June 21, 1906"; 283

284 and to which finding or decision the plaintiff in error duly excepted.

9. The Court erred in making the finding or decision contained in its written decision and findings dated February 27th, 1911, and therein numbered "VII", in the words and figures following:

"That said Wendell M. Reed was during
285 said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Roswell, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant, by the Director of the U. S. Geological Survey, to whom the Secretary of the Interior referred said matter, and by the
286 Chief Engineer and Assistant Chief Engineer of the Reclamation Service, under the direction of said Department, ratified and adopted the acts of said Wendell M. Reed, District Engineer, in respect to the possession of said engine and appurtenances";

and to which finding or decision the plaintiff in error duly excepted.

287

10. The Court erred in making the finding or decision contained in its written decision and findings dated February 27th, 1911, and therein numbered "X", in the words and figures following:

"That during the use and occupation of 288
the said engine and appurtenances by the
defendant, the plaintiff, to-wit: on or about
June 16, 1905, and also on or about Septem-
ber 30, 1905, notified the defendant of the
execution and filing of said mortgage as
aforesaid and that the plaintiff claimed the
said property under the title thereby vested
in it and claimed the right of possession, be-
cause of the default by the mortgagor in the 289
conditions thereof, and that the defendant at
all said times well knew of the existence and
filing of said chattel mortgage and did not at
any time dispute the validity thereof, and on
September 30, 1905, represented to the plain-
tiff that the defendant was using and would
continue to use said engine in said work and
that any legal proceedings to recover the pos-
session thereof would be resisted and de- 290
feated by the defendant, and further repre-
sented to the plaintiff that if said property
were left in the defendant's possession, its
attorney would recommend payment by the
defendant therefor.";

and to which finding or decision the plaintiff-in-error duly excepted.

291

11. The Court erred in making the finding or decision contained in its written decision and findings dated February 27th, 1911, and therein numbered "XI", in the words and figures following:

292 "That the plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid and consented to defendant's retaining possession of said property in expectation of receiving due compensation therefor.";

293 and to which finding or decision the plaintiff-in-error duly excepted.

12. The Court erred in making and deciding the conclusion of law contained in its written decision and findings dated February 27th, 1911, and therein numbered "1", in the words and figures following:

294 "That the plaintiff was the lawful owner of the said property of June 16, 1905, when it demanded the possession thereof from the defendant and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co., and its assigns.";

and to which conclusion of law the plaintiff-in-error duly excepted.

295 13. The Court erred in making and deciding the conclusion of law contained in its written decision and findings dated February 27th, 1911, and therein numbered "2", in the words and figures following:

"That after the aforesaid refusal by the defendant of such demand, the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property.";

296

and to which conclusion of law the plaintiff-in-error duly excepted.

14. The Court erred in making and deciding the conclusion of law contained in its written decision and findings dated February 27th, 1911, and therein numbered "3", in the words and figures following:

297

"That the defendant is estopped by the conduct of its officers and representatives from denying that the said engine and its appurtenances were the property of the plaintiff.";

298

and to which conclusion of law the plaintiff-in-error duly excepted.

15. The Court erred in making and deciding the conclusion of law contained in its written decision and findings dated February 27th, 1911, and therein numbered "4", in the words and figures following:

299

"That the plaintiff is entitled to recover against the defendant the sum of $1,174.60, with interest thereon from June 21, 1906, together with the costs and disbursements of this action.";

300 and to which conclusion of law the plaintiff-in-error duly excepted.

Dated, Buffalo, N. Y., June 29th, 1911.

JOHN LORD O'BRIAN,
*Attorney of the United States* in and for the Western District of New York,
301 405 Federal Building,
Buffalo, N. Y.

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UNITED STATES CIRCUIT COURT.
WESTERN DISTRICT OF NEW YORK.

302 BUFFALO PITTS COMPANY,
*Plaintiff,*
AGAINST
THE UNITED STATES OF AMERICA,
*Defendant.*
No. 303 Order for Writ.

303 Upon motion of John Lord O'Brian, Attorney of the United States in and for the Western District of New York, and attorney for the defendant in the above entitled cause, and, upon filing a petition for a writ of error, and upon filing an assignment of errors,

It is ordered, That a writ of error be, and it 304
is, hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, the judgment heretofore entered herein on the 1st day of March, 1911, and that all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Second Circuit.

305

JOHN R. HAZEL,
*United States Judge.*

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UNITED STATES CIRCUIT COURT.

Western District of New York. 306

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|---|---|
| Buffalo Pitts Company, *Plaintiff,* AGAINST The United States of America, *Defendant.* | Petition for Writ. |

307

And now comes the United States of America, the defendant herein, and says that this Court having directed a verdict in favor of the plaintiff on the 9th day of February, 1911, on the trial of

308 the above entitled cause, to which the defendant duly excepted, and said Court on the 28th day of February, 1911, having filed its findings of fact and conclusions of law, to which the said defendant has also duly excepted, a judgment pursuant to said direction of verdict, findings of fact and conclusions of law, was entered herein on the 1st day of March, 1911, in favor of the plaintiff and against the defendant, in which said judgment
309 and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Second
310 Circuit, for the correction of errors, so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the said Court of Appeals.

Dated, Buffalo, N. Y., 30th day of June, 1911.

JOHN LORD O'BRIAN,
*Attorney of the United*
311 *States* in and for the
Western District of
New York, and attorney for defendant,
405 Federal Building,
Buffalo, N. Y.

WRIT OF ERROR. 312

UNITED STATES OF AMERICA—ss.

*The President of the United States of America, to the Honorable John R. Hazel, Judge of the United States Circuit Court for the Western District of New York, and to said Court,*

*Greeting:*

Because in the record and proceedings, as also 313
in the rendition of the judgment which is in the said Circuit Court before you, between the Buffalo Pitts Company, plaintiff, and the United States of America, defendant, a manifest error hath happened to the great prejudice of the said plaintiff, as is said and appears by the petition and assignment of errors herein:

We, being willing that such error, if any hath happened, should be duly corrected and full and 314
speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the court rooms of said Court, in the Post Office Building in the City of New York, in the State of New York, to- 315
gether with this writ, so as to have the same at the said place in said Circuit on or before the 29th day of July, 1911, that the record and proceedings aforesaid being inspected, the said Judges of United States Circuit Court of Appeals for the

316 Second Circuit may cause further to be done therein to correct that error what of right and according to law and customs of the United States ought to be done.

Witness: The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 30th day of June, 1911.

317 HARRIS S. WILLIAMS,
*Clerk of the United States Circuit Court*, for the Western District of New York.

The foregoing writ of error is hereby allowed this 30th day of June, 1911.

JOHN R. HAZEL,
318 *United States Judge.*

THE UNITED STATES CIRCUIT COURT OF APPEALS—FOR THE SECOND CIRCUIT.

THE UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK—ss. } Citation.
To Buffalo Pitts Company:

319 *Greeting:*

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in said Circuit, on the 29th day of July, 1911, next, pursuant to

a writ of error filed in the Clerk's office of the 320
United States for the Western District of New York, wherein the United States of America are plaintiffs-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered in said cause as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

321

WITNESS, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 30th day of June, A. D., 1911.

JOHN R. HAZEL,
*United States District Judge,*
sitting in the Circuit Court. 322

Attest:

HARRIS S. WILLIAMS,
*Clerk United States Circuit Court,*
For the Western District of New York.

323

324 UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff*,

AGAINST

THE UNITED STATES OF AMERICA,
*Defendant*.

Stipulation.

325

IT IS HEREBY STIPULATED, That the printed record on appeal by the defendant from the decree and judgment heretofore granted and entered herein shall contain the following papers: Petition, answer, decision and findings, judgment, exceptions to decision and findings, bill of exception, including the transcript of evidence and exhibits
326 therein contained, assignments of error, petition and order for writ of error, writ of error, citation, order extending time to forward record and this stipulation.

Dated, Buffalo, N. Y., September 7th, 1911.

WHITE AND BABCOCK
*Attorneys for Plaintiff*.

327

JOHN LORD O'BRIAN,
*United States Attorney* in and for the Western District of New York, and attorney for the defendant.

UNITED STATES CIRCUIT COURT. 328

WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,
*Plaintiff*,

AGAINST

THE UNITED STATES OF AMERICA,
*Defendant*. 329

ON MOTION of John Lord O'Brian, Attorney of the United States in and for the Western District of New York, and attorney for the above named defendant,

IT IS ORDERED, That the time within which the above named defendant may send the record and 330
proceedings, with all things concerning the same, together with the writ of error, in the above entitled action, be and the same is hereby extended to and including the 2d day of October, 1911, and that this order be, and the same is, hereby granted *nunc pro tunc* as of the 29th day of July, 1911, to be entered as of that date.

Dated, Buffalo, N. Y., September 18th, 1911. 331

JOHN R. HAZEL,
*United States Judge*.

332 UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK—ss.

I, Harris S. Williams, Clerk of the Circuit Court of the United States for the Western District of New York, do hereby certify the foregoing to be a transcript of the records of the Circuit Court, in the cause named at the beginning thereof, made up pursuant to Rule XIV of the Rules of the
333 United States Circuit Court of Appeals for the Second Circuit; Rule XXXI of the Supreme Court of the United States, and Rules 1, 2, 3 and 4 of the Circuit Court of the United States for the Western District of New York, adopted to conform the practice of the Clerk's office to the provisions of the "Act to Diminish the Expense of Proceedings on Appeal," passed February 13, 1911.

334 IN TESTIMONY WHEREOF, I have hereunto signed my name, and caused the seal of said Court to be affixed at the City of Buffalo, in said District, the .. day of September, Anno Domino Nineteen Hundred and Eleven.

HARRIS S. WILLIAMS,

335 *Clerk United States Circuit Court*, Western District of New York.

85 United States Circuit Court of Appeals, for the Second Circuit.

No. 139.—October term, 1911.

Argued January 5, 1912. Decided January 29, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,
*vs.*
THE BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

In error to the Circuit Court of the United States for the Western District of New York.

Before Lacombe, Ward, and Noyes, circuit judges.

WARD, Circuit Judge:

This is a writ of error to a judgment of the Circuit Court sitting as a Court of Claims under the Tucker Act of March 3, 1887, 24 Stat., 505, in favor of the plaintiff and against the United States.

The Government had under the reclamation act of June 17, 1902, 32 Stat., 389, entered into a contract with the Taylor-Moore Construction Company to build the Hondo Dam in connection with the Hondo Project in New Mexico. Section 7 of that act provides:

"That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be
86 needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

It was a condition of the contract that upon the construction company's default the Government might take over the contract and possession of all the construction company's machinery delivered on the ground for the purpose of completing the work.

The plaintiff sold to the construction company a traction engine to be used in this contract and the company executed a chattel mortgage thereon to the plaintiff to secure the payment of the price.

June 7, 1905, upon the construction company's default, the Government did rightfully take over the contract and all the company's property which included the construction company's interest in the traction engine as mortgagor.

June 20, 1905, the plaintiff which as mortgagee was always the owner of the engine, 6 Cyc. 985; Kitchin v. Sluster, 14 N. M., 164, became entitled to the possession of it because of the construction company's failure to pay the first note falling due that day.

The Government refused to deliver the engine to the plaintiff on its demand, continued to use it in the work, and the plaintiff having

notified the Government of its title and right to compensation, took no further proceedings, if indeed, any could have been taken against the United States in the matter.

After the Hondo Dam was completed the Government abandoned the engine, the plaintiff took possession of it and began this action to recover the fair and reasonable value of its use.

There was no need for formal proceedings in condemnation, and the rights of the plaintiff were not prejudiced by the omission of the Government to take them. As Mr. Justice Brewer said in United States v. Lynah, 188 U. S., 445, at 467:

"This brings the case directly within the scope of the decision in United States v. Great Falls Manufacturing Company, supra, where, as here, there was no direction to take the particular property,
87 but a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings and sue to recover the value.

"It does not appear that the plaintiffs took any action to stop the work done by the Government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by the Government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation. Roberts v. Northern Pacific Railroad, 158 U. S. 1, 11; Northern Pacific Railroad v. Smith, 171 U. S., 260, and cases cited in the opinion."

The trial judge held as a matter of law that the refusal of the Government to deliver possession of the engine to the plaintiff after its right to possession under the chattel mortgage accrued, raised an implied promise to pay for its use.

Sec. 1059, U. S. Rev. Stat., which defined the jurisdiction of the Court of Claims down to the passage of the Tucker Act, so far as relevant reads as follows:

"SEC. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress."

It is abundantly established by authority that under this section the court had no jurisdiction of claims arising out of tort. In United States v. Great Falls Manufacturing Co., 112 U. S., 645, 656, the Supreme Court, speaking by Mr. Justice Miller, said:

"The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings
88 for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Govern-

ment enjoined from prosecuting it until provision was made for securing in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl v. United States, 91 U. S., 367, 374. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, expressed or implied, with the Government of the United States.'"

He distinguished the case from Langford v. United States, 101 U. S., 341, on the ground that in it the Government claimed the land it took as its own.

Assuming that the law applicable to the present situation is the same as it was before the passage of the Tucker Act, we think the judgment of the court below was right. The Government did not claim any title to the engine nor deny the plaintiff's title. It claimed the right to continue the use of the engine in the public work. This right it had as sovereign and under the 7th section of the reclamation act, subject to the duty of paying for the use and from this duty a promise to pay is to be implied as in United States v. Great Falls Manufacturing Co., supra.

89 The applicable provision of the Tucker Act is this language of the first section:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. * * *"

Mr. Justice Brown in Dooley v. United States, 182 U. S., 222, 224, pointed out the difference between this provision and sec. 1059, saying:

"The first section evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a

regulation of an executive department; (3) cases of contract, expressed or implied, with the Government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words "not sounding in tort" are in terms referable only to the fourth class of cases."

Mr. Justice White delivered a dissenting opinion in which Justices Gray, Shiras, and McKenna concurred, not involving this question at all. We may assume that if Justice Brown did not speak for the whole court on this point, he did at least speak for Chief Justice Fuller and Justices Harlan, Brewer, and Peckham. However, in United States v. Lynah, supra, Mr. Justice Brewer delivered the opinion of the court, holding that when the Government takes property not claimed as its own an implied promise to pay is raised. He followed United States v. Great Falls Manufacturing Co., supra, and reasoned as if the changed language of the Tucker Act made no change in the law, saying at p. 464:

"The rule deducible from these cases is that when the Gov-
90 ernment appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the Government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the Government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the Government takes possession of property under the claim that it belongs to the Government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the Government to pay for that which it claims to own. Very different from this proprietary right of the Government in respect to property which it owns is the governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the fifth amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

Mr. Justice Brown wrote a concurring opinion in which he declined to rest the judgment on an implied contract to pay, holding that the taking was a trespass in which there could be no waiver of the tort and that the Government was obliged to pay under the fifth amendment whether the claim sounded in tort or not. Justices Shiras and Peckham held that the court had jurisdiction on both grounds. Mr. Justice McKenna took no part in the decision. Mr. Justice White for himself and Chief Justice Fuller and Justice Harlan dissented on grounds that did not involve this question at all.

We may at least assume that Justices Fuller and Harlan,
91 who concurred in the opinion of the court in the Dooley case, supra, agreed with Justices Shiras and Peckham, thus making a majority of the court that the construction of the Tucker Act taken by Mr. Justice Brown was right.

Accordingly, we think the judgment below right, whether it rested on an implied contract of the Government to pay within the opinion of Mr. Justice Brewer in the Dooley case or upon its constitutional obligation within the opinion of Mr. Justice Brown.

It remains only to distinguish two cases much relied upon by the Government. Bigby v. United States, 188 U. S., 400, was an action for damages for personal injuries sustained by the plaintiff as the result of the negligence of a Government servant in running an elevator in the Post Office Building at Brooklyn. It was a pure action in tort, having absolutely nothing to do with the taking of private property. Hooe v. United States, 218 U. S., 322, involved the taking of property by the Secretary of the Interior in direct violation of the act of Congress under which he acted. Of course there could be no pretense that he was authorized by the United States to do what he did. There was no taking by the Government and no promise to pay could be implied. But as interest cannot be recovered of the Government except where specially allowed by statute, the court below is directed to strike out the amount included for interest, and the judgment so modified is affirmed.

W. Palmer, Asst. U. S. Attorney, for the plaintiff in error.

E. P. White for the defendant in error.

92 United States Circuit Court of Appeals for the Second Circuit.

No. 139.—October term, 1911.

Argued January 5, 1912. Decided January 29, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,
*vs.*
THE BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

In error to the Circuit Court of the United States for the Western District of New York.

Before Lacombe, Ward, and Noyes, circuit judges.

NOYES, Circuit Judge (dissenting):

There is a clear distinction between a governmental and a proprietary right. When the United States in the exercise of their sovereign authority appropriate private property, the Constitution guarantees compensation and the law implies a promise to pay, upon which the owner, waiving formal condemnation proceedings, may sue. But when the Government uses property because it claims a title or interest in it, it asserts a proprietary right. If this be asserted

wrongfully—if the officers of the Government take possession of property in which it has no interest—a tort is committed, but there can be no implication that the Government promises to pay for a thing which it claims to be entitled to without paying.

Stated in another way: When the Government takes property in a manner equivalent to informal condemnation proceedings, a
93 recognition of the duty to make compensation must be presumed and may amount to an implied promise to pay. In such a case there is no difficulty in treating the relations of the sovereign and the property owner as contractual. But when the Government uses property which it claims to own or have an interest in, it occupies the position of a private person asserting a private right and just as an individual who takes property which does not belong to him is liable in trespass or trover and not in contract, so whatever liability attaches to the Government officers for a wrongful use is founded in tort. There is nothing to form the basis of a contract.

To illustrate: If the officials had seized this engine because it was available and was a necessary instrument for the prosecution of the public work, there would have been an appropriation by governmental authority from which the law would imply a promise to make payment—such promise being merely the legal recognition of a conceded obligation. But if the officials had used the engine because they claimed that the Government had a title giving it the right to use it, there could be no such implied promise even if in fact it had no title, because in such a case the use would be a disclaimer of any accountability therefor. There would be no meeting of minds.

The difficulty with the opinion of the majority, as I view it, is not in failing to recognize, but in failing to apply, these principles. The opinion seems almost to beg the whole question by stating, without discussion, that "the Government did not claim any title to the engine or deny the plaintiff's claim." If the Government did not make a claim of proprietary right and asserted only its governmental authority to take and use the engine in the public work, I certainly could not, consistently with that which has just been written, dissent. But as I read the testimony, the very opposite conclusion to that stated by the majority must be drawn from it. It seems to me entirely clear that the Government officials used the engine because the contract with the defaulting contractors gave the Government the right to use the machinery upon the works and because they claimed that the rights of the Government thereunder were superior to those of the plaintiff as the holder of a chattel mortgage. Thus the chief engineer, to whom the matter was referred, claimed in a letter to the plaintiff that the engine having been delivered
94 and used upon the works by the contractors before the chattel mortgage was filed, was subject to the provisions of the contract. So the district engineer as a witness stated that he claimed the engine under the contract. There is substantially nothing upon the part of the plaintiff to contradict this testimony.

The record is, in my opinion, insufficient to determine whether the contract provision authorizing the Government to take possession of the property of the contractors and continue the work, gave it rights with respect to the engine in question superior to those of the plaintiff as the holder of a chattel mortgage thereon. But upon such a record showing the claims made in behalf of the Government of its rights under the contract, I am wholly unable to comprehend how it can be denied that the Government asserted a proprietary right or can be held that it acted in its sovereign capacity by proceedings equivalent to those of eminent domain.

In my opinion the judgment should be reversed.

95 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 8th day of February, one thousand nine hundred and twelve.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR,
*vs.*
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said Circuit Court be, and it is hereby, modified in accordance with the opinion of this court and as so modified is affirmed.

It is further ordered that a mandate issue to the district court in accordance with this decree.

E. H. L.

I rose to deny.

H. G. W.

I concur.

E. H. L.

96 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. vs. Buffalo Pitts Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed February 8, 1912. William Parkin, clerk.

97 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
*against*
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

*To the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit:*

The petition of the United States of America, by John Lord O'Brian, its attorney in and for the Western District of New York, respectfully shows:

That the appeal herein was argued in the Circuit Court of Appeals for the Second Circuit at the present term thereof, on the 5th day of January, 1912, and that thereafter and on the 29th day of January, 1912, judgment was rendered therein, modifying the judgment of the Circuit Court for the Western District of New York by striking therefrom the amount of interest included therein, and, as so modified, affirming such judgment. The opinion of the court in
98 declaring its judgment was written by Judge Ward and was concurred in by Judge Lacombe; a dissenting opinion was written by Judge Noyes.

The plaintiff in error now respectfully applies for a rehearing in said appeal for the following reasons:

1. It appears from the opinion of the court herein that its judgment was largely, if not entirely, based upon the conclusion that the Government did not claim any title to the engine, for the use of which the defendant in error seeks compensation, nor deny the title of the defendant in error to it.

The plaintiff in error most respectfully but earnestly protests that this conclusion finds no sufficient warrant in the record herein. Whatever was done in the premises by the officers or employees of the United States was done by Wendell M. Reed, a district engineer in the Reclamation Service; H. C. Rizer, Acting Director of the Geological Survey; F. H. Newell, chief engineer in the Reclamation Service; and W. H. Llewellyn, United States attorney for New Mexico.

Without here entering into any extended presentation of the details of their respective acts, an examination of the record will clearly disclose that Reed, Rizer, and Newell consistently and uniformly both asserted the paramount right of the Government to take the engine not as a governmental, but as a proprietary right, under the terms of the contract between the United States and the
99 Taylor-Moore Construction Company, and refused to recognize any right of the defendant in error to or in it (pp. 61–63, 35–41, 47, 51–53 printed record on appeal).

The argument before the Circuit Court of Appeals was largely confined to the several legal phases of the case rather than to any thorough presentation of the facts, and it appears altogether probable that counsel for the plaintiff in error in this respect failed to

impress upon the court the significance and importance of these acts, and that for such reason their bearing upon the question was overlooked.

The part taken by the United States attorney for New Mexico in the matter was of no importance either way—he wrote the Attorney General for instructions, including in his letter some expressions of opinion as to the outcome of possible litigation, but the record discloses no reply to his inquiry.

To authorize a recovery in the Circuit Court sitting as a Court of Claims under the jurisdiction conferred by the Tucker Act, the defendant in error was bound to establish that its claim was upon a contract implied in fact—that is, the minds of the parties must have met upon the proposition that compensation would be made for the engine's use by the United States. The evidence clearly establishes that there never was such a meeting.

2. If this court considered itself bound by the findings of fact included in the record, and was led into material error by any insufficiency in them with respect to the facts hereinbefore pre-
100 sented, it is further respectfully suggested that it is well within its powers to grant the application of the plaintiff in error for a rehearing, and pending the same to remand thes case to the Circuit (District) Court for more specific findings to show the exact actions taken by and the relations existing between the representatives of the respective parties (U. S. vs. Kelly, 89 Fed., 946; Ripley vs. U. S., 220 U. S., 491); and that particularly such requirement for additional findings should specifically include findings:

(a) Whether or not Wendell M. Reed, district engineer of the Reclamation Service, in his first conversation with the representative of the Buffalo Pitts Company on June 16, 1905, and in all subsequent conversations with said representative, took the position that his action with reference to retaining possession of said traction engine would be controlled by the terms of the contract of December 4, 1904, between the United States and the Taylor-Moore Construction Company and stated his belief to said representative that the Government had a perfect right under said contract to retain and use the engine as well as all other equipment formerly in the possession of the construction company for the completion of the work embraced in its contract.

(b) Whether or not, on August 2, 1905, H. C. Rizer, Acting Director of the United States Geological Survey, in response to
101 a letter addressed to the Secretary of the Interior by the Buffalo Pitts Company and referred to that officer for reply, officially advised said company, among other things, that:

Under the terms of said contract, in case of default by the contractor the United States is entitled to the possession of the contractor's machinery delivered on the ground, and if the engine referred to was delivered, the United States has taken possession of it under the terms of said contract.

The remedy of those furnishing labor or materials used by contractors in the prosecution of contracts with the United States appears to be set forth in the act of Congress approved February 24, 1905 (33 Stats., 811).

(c) Whether or not it appears from the evidence that plaintiff below availed itself of the remedy provided by the act of February 24, 1905, by suing the said Taylor-Moore Construction Company and its sureties, or otherwise, to recover the purchase price of said traction engine.

(d) Whether or not, on September 26, 1905, F. H. Newell, chief engineer of the Reclamation Service, addressed a communication to the Buffalo Pitts Company as follows:

" In reference to your letter of August 22, 1905, and to letter from this office of August 30, 1905, advising you that the matter of
102 your claim in connection with an engine furnished the Taylor-Moore Construction Company, under its contract with the Government for construction work under the Hondo project, New Mexico, was referred to the engineer in the field for a statement, you are advised that the engineer in charge reports that the engine was furnished and was in use upon the work before any instrument was filed showing title in any one other than the contractors. Upon default of the contractors, the Government under the terms of the contract which was in force at the time the chattel mortgage is said to have been filed, took possession of all the machinery, tools, and appliances belonging to the contractor upon the ground.

" The status of the machinery in question is the same as that of other machinery, tools, stock, etc., belonging to the contractors and taken over by the Government in pursuance of the express terms of the contract, and until the work is completed and matters under the contract are finally adjusted, no change in the status of the machinery can be made nor claims thereto recognized."

(e) So far as it is a matter of fact and not a conclusion of law, whether or not, at the time of the assignment of said traction engine to the United States by the Taylor-Moore Construction Company on June 7, 1905, the officers and agents of the United States recognized lawful possession in any one other than the assignor.

103 (f) So far as it is a matter of fact and not a conclusion of law, whether or not, at the time of the assignment of said traction engine to the United States, or at any period subsequent thereto, any negotiations were had between the officers and agents of the United States authorized to act in the premises, and the representatives of the Buffalo Pitts Company, indicating a meeting of the minds of the parties and from which a contract could be implied in fact that the Government agreed and intended to pay said company the reasonable rental value for the use of said traction engine.

(g) Whether or not, on June 4, 1908, Wendell M. Reed, district engineer for the Reclamation Service, addressed an official communication to the Buffalo Pitts Company as follows:

Referring to your request by telephone for information concerning dates of contracts, etc., on Hondo project, New Mexico:

The Taylor-Moore Construction Company assigned to the United States their interest in their contract on the Hondo project, on June 7, 1905, and the United States on that date took charge of all material, supplies, and equipment belonging to them.

The United States entered into contract with Wood, Bancroft & Doty to finish a part of the unfinished work of the Taylor-
104 Moore Co., on November 13, 1905. Wood, Bancroft & Doty finished their contract on June 31, 1906. Since the last-mentioned date the Buffalo Pitts engine under discussion has not been used by the United States or any of its agents.

(h) Whether or not, on September 30, 1905, the United States attorney for New Mexico wrote to the Attorney General as follows:

In this connection I desire to call your attention to the fact that the Buffalo Pitts Mfg. Co. furnished the Taylor-Moore Construction Co. with a traction engine of the value of $1,600, giving said Buffalo Pitts Mfg. Co. a chattel mortgage on same. The reclamation engineers are using this engine. The Buffalo Pitts Company desire either to have the engine or make some arrangement whereby they may be paid for this sale, and the question is in the event of their attempting to replevy same and take it from the possession of the engineers, whether I should resist it or not. I take it that there could be a redelivery to the engineers and under section 1001, R. S., would not be required to give a bond, and could probably keep possession of the engine for some time and thus enable the engineers to complete the reservoir in question. But would not this subject the Govment to a suit which would result eventually in the Government having to pay for the engine? I will thank you to advise me what, in your opinion, would be the correct position for me to take on this question.

105 (i) Whether or not it appears from the evidence that the Attorney General, the Secretary of the Interior, or any other qualified officer of the United States, expressly or by implication, authorized the United States attorney for New Mexico to bind the Government by a promise to pay plaintiff for the use of said engine, and whether or not such a promise was in fact ever made.

Wherefore your petitioner respectfully prays that it be allowed to reargue its appeal herein with particular reference to the significant and important bearing of the facts hereinbefore set forth upon the questions here raised, and that pending such reargument the record herein be remanded to the Circuit (District) Court for the Western District of New York with directions to make specific and additional findings in the matters hereinbefore enumerated.

Dated, Buffalo, N. Y., April 22, 1912.

JOHN LORD O'BRIAN,
*Attorney of the United States in and for the Western District of New York.*

WILLIAM PALMER,
*Assistant United States Attorney.*

106 I, John Lord O'Brian, United States attorney in and for the Western District of New York, as counsel for the plaintiff in error herein, hereby certify that in my opinion the foregoing application for a rehearing is founded upon good and sufficient grounds and is not interposed for the purpose of delay.

Dated, Buffalo, N. Y., April 22, 1912.

JOHN LORD O'BRIAN,
*Attorney of the United States in and for the Western District of New York.*

WILLIAM PALMER,
*Assistant United States Attorney.*

107 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, city of New York, on the 5th day of May, 1910.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, circuit judges.

THE UNITED STATES, PLAINTIFF IN ERROR,
*vs.*
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

A petition for a rehearing having been filed herein by counsel for the plaintiff in error:

Upon consideration thereof it is—

Ordered that said petition be, and hereby is, denied.

H. G. W.

(Endorsed:) United States vs. Buffalo Pitts Co. Order. United States Circuit Court of Appeals, Second Circuit. Filed May 6, 1912. William Parkin, clerk.

108 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
*vs.*
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

*To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and to the other justices of the said honorable court, and to the honorable the Supreme Court of the United States:*

The United States of America, plaintiff in error, in the United States Circuit Court of Appeals for the Second Circuit, feeling itself aggrieved by the decision of the said Circuit Court of Appeals heretofore rendered in this action on January 30th, 1912, comes now by John Lord O'Brian, attorney of the United States in and for the western district of New York, and complains that in the record

and proceedings had in such cause, as well as in the rendition of said decision and the making of an entry of judgment thereon, divers manifest errors have happened to the great prejudice of the said United States of America, as more fully appears from the assignment of errors herewith presented and submitted by it and filed herein.

Wherefore the said The United States of America prays and petitions for the allowance of a writ of error, and for such other and further order or citation and process as may cause the said errors and each of them to be corrected by the said Supreme Court
109 of the United States.

And your petitioner prays for a reversal of so much of the judgment as is complained of in the assignment of errors herewith presented and for the correction of the errors so complained of, and for such other, further, and proper relief as may be just in the premises, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner will ever pray.

Dated, Buffalo, N. Y., this 20th day of August, 1912.

JOHN LORD O'BRIAN,
*Attorney of the United States in and for the Western District of New York.*

110 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
*vs.*
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

Upon motion of John Lord O'Brian, attorney of the United States in and for the western district of New York, and attorney for the plaintiff in error in the above-entitled cause, and upon filing a petition for a writ of error, together with an assignment of errors, it is

Ordered that the writ of error be, and it is hereby, allowed to have reviewed in the Supreme Court of the United States the judgment heretofore affirmed herein by the Circuit Court of Appeals on the 30th day of January, 1912, and that all further proceedings be suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States.

Dated, Buffalo, N. Y., August 20, 1912.

JOHN R. HAZEL,
*United States Judge in and for the Western District of New York.*

111 (Indorsed:) United States Supreme Court. The United States of America, plaintiff in error, vs. Buffalo Pitts Company, defendant in error. Petition and order. John Lord O'Brian, United States attorney, attorney for plaintiff in error, 405 Federal Building, Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 29, 1912. William Parkin, clerk.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
*vs.*
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

*Assignment of errors.*

And now comes The United States of America, plaintiff in error, and makes and files this its assignment of errors.

1. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the errors committed by it in receiving the testimony offered on the part of the defendant in error by George Hockenhull as to conversations with W. H. H. Llewellyn, United States attorney for New Mexico, tending to establish any agreement that the United States would pay for the use of the engine mentioned by the witness, and by John B. Olmsted as to the market value of said engine in the months of May and June, 1905.

2. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the errors committed by it in denying the motion of the plaintiffs in errors to dismiss the bill of complaint herein upon the ground that the defendant in error could not recover herein because at the time of the
113 taking over of the engine by the plaintiff in error the defendant in error was not in possession and was not entitled to possession of the engine and had no right or authority to make or enter into any contract for its use; that the proof of the defendant in error failed to establish any action of the plaintiff in error from which an implied promise to pay for the engine could be found or that those with whom the alleged conversations and transactions occurred had any authority to bind the United States to any such contract or agreement; that the Circuit Court had not jurisdiction of this suit; that there was no competent evidence or proof as to any damages sustained by the defendant in error; that as the taking of the engine by the United States was a lawful taking no action to recover will lie against it.

3. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its written decision dated February 27th, 1911, and numbered "VI":

"That on or about the 16th day of June, 1905, at Roswell, New Mexico, the plaintiff by its agent made a demand upon the defendant through Wendell M. Reed, district engineer of the Reclamation Service under the Department of Interior, for the possession of said engine and appurtenances, which the defendant then and there

refused, and thereafter the defendant retained and used said property in the work under said contract until June 21, 1906."

4. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its written decision dated February 27th, 1911, and numbered "VII":

114 "That said Wendell M. Reed was during said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Roswell, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant, by the Director of the United States Geological Survey, to whom the Secretary of the Interior referred said matter, and by the chief engineer and assistant chief engineer of the Reclamation Service, under the direction of said department, ratified and adopted the acts of said Wendell M. Reed, district engineer, in respect to the possession of said engine and appurtenances."

5. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "X":

"That during the use and occupation of the said engine and appurtenances by the defendant the plaintiff, to wit, on or about June 16, 1905, and also on or about September 30, 1905, notified the defendant of the execution and filing of said mortgage as aforesaid and that the plaintiff claimed the said property under the title thereby vested in it and claimed the right of possession because of the default by the mortgagor in the conditions thereof, and that the defendant at all said times well knew of the existence and filing of said chattel mortgage and did not at any time dispute the validity thereof, and on September 30, 1905, represented to the plaintiff that the defendant was using and would continue to use said engine in said work and that any legal proceedings to recover the possession thereof would be resisted and defeated by the defendant, and further represented to the plaintiff that if said property were left in the defendant's possession its attorney would recommend payment by the defendant therefor."

6. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "XI":

"That the plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the de-

115 fendant and upon the representations made to it as aforesaid,

and consented to defendant's retaining possession of said property in expectation of receiving due compensation therefor."

7. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "1":

"That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defendant, and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co. and its assigns."

8. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "2":

"That after the aforesaid refusal by the defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property."

9. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "3":

"That the defendant is estopped by the conduct of its officers and representatives from denying that the said engine and its appurtenances were the property of the plaintiff."

10. The United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the United States
116 Circuit Court for the Western District of New York as modified by the decision of the said Circuit Court of Appeals entered February 21st, 1912; in finding and deciding that the refusal of the United States to deliver possession of the engine to the defendant in error when demanded raised an implied promise to pay for its use; in finding and deciding that the United States did not claim title to the engine nor deny the title thereto of the defendant in error; and in finding and deciding that the judgment of the United States Circuit Court for the Western District of New York herein was right whether resting on an implied contract to pay or upon the obligation imposed upon the United States by the fifth amendment to the Constitution.

11. The United States Circuit Court of Appeals for the Second Circuit erred in denying the application of the plaintiff in error for a reargument of its appeal herein and in refusing to remand the case to the trial court for more specific findings as to the actions taken by and the relations existing between the representatives of the respective parties hereto as set forth in the petition of the United

States attorney in and for the western district of New York, dated April 22nd, 1912.

Dated, Buffalo, N. Y., August 20, 1912.

JOHN LORD O'BRIAN,
*United States Attorney in and for the*
*Western District of New York,*
*405 Federal Building, Buffalo, N. Y.*

117 (Endorsed:) United States Supreme Court. The United States of America, plaintiff in error, *vs.* Buffalo Pitts Company, defendant in error. Assignment of errors. John Lord O'Brian, United States attorney, attorney for plaintiff in error, 405 Federal Building, Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed August 29, 1912. William Parkin, clerk.

118 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, William Parkin, clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 117, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of The United States against The Buffalo Pitts Company as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 24th day of September, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the said United States the one hundred and thirty-seventh.

[SEAL.] WM. PARKIN,
*Clerk.*

119 UNITED STATES OF AMERICA, *ss:*

*The President of the United States to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Buffalo Pitts Company, plaintiff, and the United States of America, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this

writ, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the said Supreme Court, the 20th day of August, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] S. W. PETRIE,
*Clerk of the United States District Court in and for the Western District of New York.*

Allowed by—

JOHN R. HAZEL,
*United States Judge in and for the Western District of New York.*

AUGUST 20TH, 1912.

120 (Indorsed:) United States Supreme Court. United States of America, plaintiff in error, vs. Buffalo Pitts Company, defendant in error. Writ of error. John Lord O'Brian, United States attorney for plff. in error, 405 Federal Building, Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 20, 1912. William Parkin, clerk.

121 THE UNITED STATES OF AMERICA, *ss:*

To Buffalo Pitts Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed with the clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John R. Hazel, United States judge in and for the western district of New York, this 20th day of August, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.] JOHN R. HAZEL,
*United States Judge in and for the Western District of New York.*

Attest:

S. W. PETRIE, *Clerk.*

122 *Return on service of writ.*

UNITED STATES OF AMERICA,
*Western District of New York, ss:*

I hereby certify and return that I served the annexed citation on the therein-named Buffalo Pitts Company by handing to and leaving

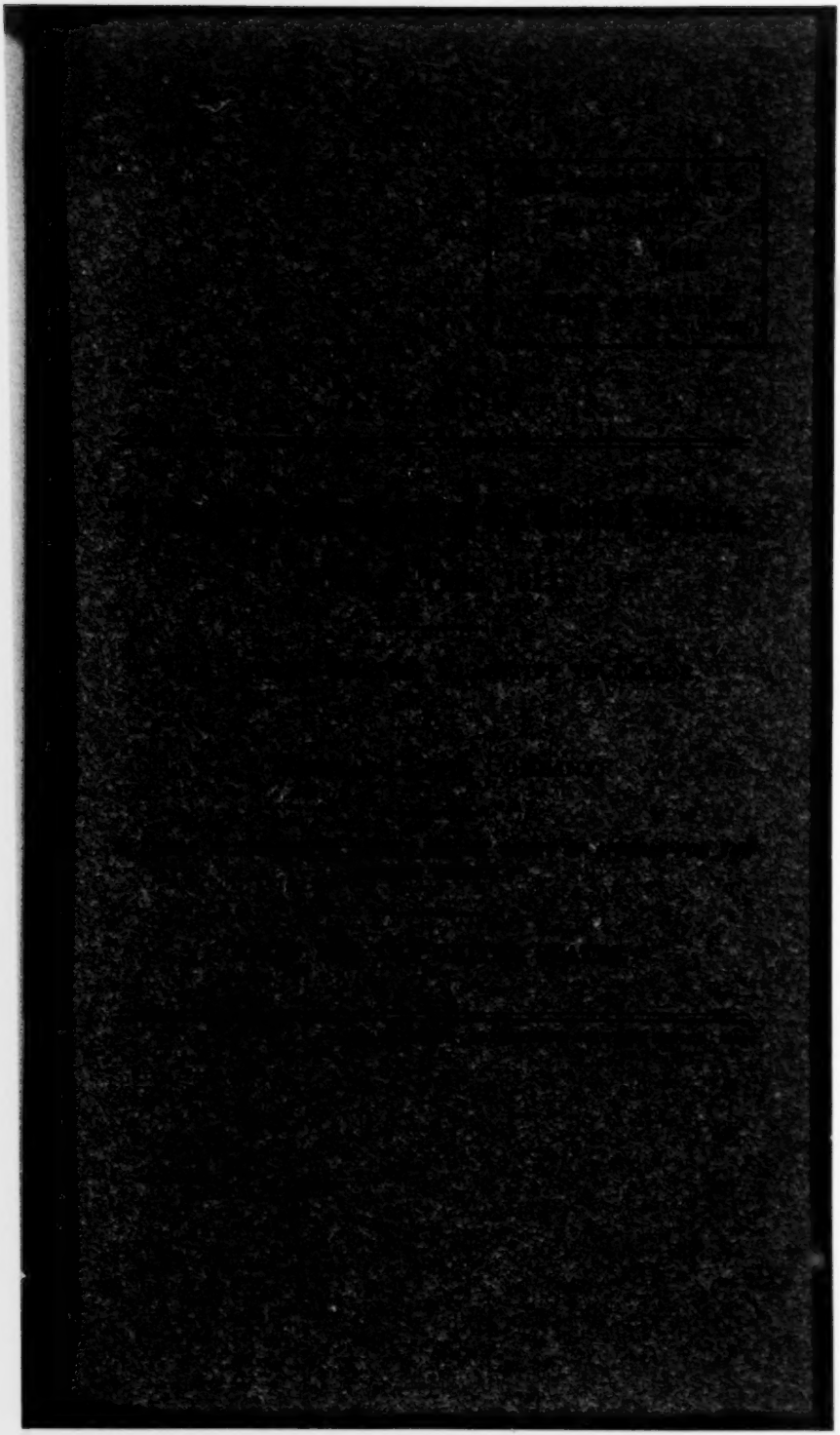
a true and correct copy thereof with J. M. Olmsted, vice pres. of said company, personally, at Buffalo, in said district, on the 27th day of Aug., A. D. 1912.

H. L. FASSETT, *U. S. Marshal.*
By MAURICE L. DOTY, *Deputy.*

123 (Indorsed:) Law 303. 2158. United States Supreme Court. United States of America, plaintiff in error, vs. Buffalo Pitts Company, defendant in error. Citation. John Lord O'Brian, United States attorney, attorney for , 405 Federal Building, Buffalo, N. Y. Filed Sept. 3, 1912, at o'c., m. S. W. Petrie, clerk.

(Indorsement on cover:) File No. 23,403. U. S. Circuit Court Appeals, 2d Circuit. Term No. 828. The United States, plaintiff in error, vs. Buffalo Pitts Company. Filed October 23d, 1912. File No. 23,403.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1912



# INDEX.



ALPHABETICAL LIST OF CASES CITED.

# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
*v.*
BUFFALO PITTS COMPANY.
No. 369.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF CASE.

This action was instituted, under the Tucker Act, by the Buffalo Pitts Company, in the Circuit Court of the United States for the Western District of New York, against the United States to recover $1,320 for the use of a certain engine, under an alleged implied contract of the United States to pay therefor; the court filed an opinion (R. 14–20), setting forth the specific findings of the facts and conclusions of law, as required by said act, and rendered judgment thereon against the United States. The case was thereupon taken, by writ of error, to the Circuit Court of Appeals for the Second Circuit, and from

that court brought here by writ of error complaining of its judgment affirming that of the trial court.

The Government contends that the Buffalo Pitts Company had no such title or right to the engine as would enable it to contract for its use; that there was no evidence showing intention to make such contract, nor conduct of the parties from which same might be implied; that no Government agent having authority, by word or conduct, made or ratified any such contract; and that the conduct of the Government's agents relied on was not in recognition of but hostile to the title or right claimed by defendant in error, and at most only tortious, from which no contract binding upon the United States could be implied; that the Buffalo Pitts Company failed to prove its case as laid, and therefore can not recover in this action; and that the case, as proved, showed said courts had no jurisdiction.

### STATEMENT OF FACTS.

The facts, as found by the trial court, pertinent to the questions herein discussed, are as follows (R., pp. 15–19):

The Buffalo Pitts Company, hereinafter called plaintiff, on May 20, 1905, sold and delivered to the Taylor-Moore Construction Company, hereinafter called the construction company, a certain traction engine for the price of $1,820, $220 thereof having been paid in cash and the balance of the purchase price, evidenced by certain promissory notes, payable in monthly installments thereafter, to secure

which deferred payments the said Construction Company executed a chattel mortgage upon said engine to plaintiff, the material terms of which provided that—

> if default should be made in payment as aforesaid, or if any attempt should be made to dispose of or injure said property or to remove said property from said County of Chaves or any part thereof, by said mortgagor or any other person, or if said mortgagor should not take proper care of said property, or if said mortgagee should at any time deem itself unsafe or insecure, then the whole amount unpaid should be considered immediately due and payable, and then, thereupon and thereafter it should be lawful for the said mortgagee to take said property and enter on the premises wherever the same be found, to take and remove the same and hold or sell and dispose of the same and all equity of redemption at public auction with notice as provided by law.

Said mortgage was duly filed for record on May 22, 1905, and no part of the money thereby secured was ever paid to said mortgagee, at all times the owner and holder of said mortgage. The engine, upon its delivery to the construction company, was put to work by it upon the so-called Hondo project, a part of the reclamation service undertaken by the Department of the Interior of the United States in New Mexico, which work was being prosecuted under a contract between the United States and the construction company. The construction company made

default in its contract with the United States on June 7, 1905, was suspended from work thereunder, and thereupon assigned to the United States all its interest in said contract. The United States, through W. M. Reed, district engineer of the Reclamation Service under the Department of the Interior, and the local representatives of the Government in charge of the work, on that day took possession of all material, supplies, and equipment belonging to the construction company, including the said engine, "pursuant to and under the provisions of said contract with the United States." (R., 17.)

On June 16, 1905, plaintiff made demand upon the United States, through said Reed, for possession of said engine, which demand was refused, and the engine retained and used until June 21, 1906. Thereafter the United States, through certain of its officers, ratified and adopted the acts of said Reed "in respect to the possession of said engine and appurtenances." (R., 18.) During the use of said engine plaintiff, on June 16, 1905, and on September 30, 1905, notified the United States of the execution and filing of said mortgage, and that it claimed said property "under the title thereby vested in it and claimed the right of possession because of the default of the mortgagor in the conditions thereof." (R., 18.) The United States "at all said times well knew of the existence and filing of said chattel mortgage and did not at any time dispute the validity thereof, and on September 30, 1905, represented to the plaintiff that the defendant was using and would continue to use said engine

in said work, and that any legal proceedings to recover the possession thereof would be resisted and defeated by the defendant, and further represented to the plaintiff that if said property were left in the defendant's possession its attorney would recommend payment by the defendant therefor." (R., 19.) "Plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant, and upon the representations made to it as aforesaid, and consented to defendant's retaining possession of said property in expectation of receiving due compensation therefor." (R., 19.)

The mortgagor has made no claim to the property since the suspension and assignment of said contract. The value of the engine at the time of the said demand and refusal was $1,674.60, and the value thereof when the defendant surrendered the said engine was $500.

**SPECIFICATION OF ERRORS.**

The assignments of error are found on pages 98 to 101, inclusive, of the record, only the substance of which need be here repeated. The contentions of the Government, as therein shown, are: That the Circuit Court of Appeals erred in refusing to reverse the judgment of the Circuit Court denying the motion of the Government to dismiss the case upon the grounds that plaintiff could not recover in this action, because at the time the Government took the engine plaintiff was not in possession nor entitled to possession thereof and had no right or authority to make any contract for its use; that plaintiff's proof

failed to establish any action of the Government or its agents from which a promise to pay could be implied, or that those with whom the alleged conversations and transactions occurred had any authority to bind the Government to any such contract; that the Circuit Court had no jurisdiction of this suit; and that as the taking of the engine by the Government was a lawful taking, no action to recover will lie against it; that the Court of Appeals erred in refusing to reverse the judgment of the Circuit Court for the errors committed by it in finding, as a matter of law, that the plaintiff was the lawful owner of the engine when it demanded possession thereof and entitled to its possession; that after the refusal by the Government of such demand for possession it was liable to plaintiff upon an implied contract to pay for the use thereof and estopped by the conduct of its officers from denying that it was the property of plaintiff; and that the Circuit Court of Appeals also erred in affirming the judgment of the Circuit Court, as modified by its decision, finding and deciding that the refusal of the United States to deliver possession of the engine to plaintiff when demanded raised an implied promise to pay for its use, and in finding and deciding that the Circuit Court was right, whether resting upon an implied contract or upon the obligation imposed upon the United States by the Fifth Amendment to the Constitution; and that the Circuit Court further erred in denying the Government's application for rehearing and its refusal to remand the case to the trial court for more specific

findings as to the actions taken by and relations existing between the respective parties.

ARGUMENT.

The Tucker Act (approved Mar. 3, 1887; 24 Stat. L., c. 359, p. 505), under which this action was brought, provides, in section 2 thereof:

> That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars.

The preceding section grants to the Court of Claims jurisdiction over:

> All claims founded * * * upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.

Under the terms of the act, and also under the allegations of the petition and the contentions of plaintiff, there can be no recovery in this action unless the evidence discloses an implied contract on the part of the United States to pay for the use of the engine in

question, it not being contended that there was an express contract nor that the Government would be liable if the action was one sounding in tort.

To constitute an implied contract in this case there must have been a meeting of the minds of parties capable of and authorized to contract with respect to the subject matter under consideration. It will not suffice to show merely such tortious acts as would, between individuals, permit the injured party to waive the tort and sue upon an implied assumpsit.

> The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract. (*Hill* v. *United States*, 149 U. S., 593, 598.)
>
> In order to give the Court of Claims jurisdiction under the act of March 3, 1887, the demand sued on must be founded on a *convention* between the parties—a *coming together of minds*—and contracts or obligations implied by law from torts do not meet this condition. (*Harley* v. *United States*, 198 U. S., 229. Headnote 1.) Italics ours.

It is therefore evident that unless plaintiff had such title to the property in question as would enable it to make a contract of the character claimed to have been impliedly made with the United States, or if the parties alleged to have represented the United States in such transactions were not authorized, or if

authorized, did not purport, by words or acts, to make such an agreement, no contract binding upon the United States can be implied.

## I.

### Plaintiff had no Such Title to the Engine as Would Enable it to Contract for its Use.

The title to the engine passed to the construction company upon the sale and delivery thereof to it. At the time plaintiff demanded the engine of the United States it had a lien or, at most, only a qualified title thereto, limited and defined by the terms of the mortgage. Such title was defeasible upon compliance with the terms of the mortgage and, in the event of default by the mortgagor, the mortgagee was only authorized to take the engine and "hold or sell and dispose of the same and all equity of redemption at public auction with notice as provided by law," retaining only sufficient of the proceeds to pay the balance due, and paying over any surplus to the mortgagor, and plaintiff had no right to use same or lease to another.

At the time the United States took possession of the engine, along with all other equipment used by the construction company upon the work, there had been no default in payment, nor had plaintiff elected to declare the mortgage due for insecurity or any other reason. The laws of New Mexico (R., 64) provide that when the contract did not otherwise stipulate the mortgagor should be entitled to possession. So that when the United States took possession of the engine

under their contract with the construction company, which antedated the date of the sale and mortgage, their possession was lawful and under a claim of right.

Whatever rights plaintiff may have had at the time of its demand for the engine, it, acting upon advice of counsel and for reasons of expediency, and not relying upon any promise of the United States or any of its agents to pay, did not choose to exercise them. Certainly it did not foreclose the mortgage and buy in the absolute title so that it might lease the engine to the United States. Therefore, having no title under foreclosure proceedings, nor right under the mortgage, to make such contract for the use of the engine, this court will not hold that it did indirectly, by means of an implied contract, what it could not directly contract to do.

## II.

### There Was no Intention to Make a Contract for the Use of Said Engine, nor Conduct of the Parties From Which Such Contract Might be Implied.

The evidence in this case and the findings of fact by the court below show that there was no mutual intent to contract for the *use* of the engine. Plaintiff neither expressly nor impliedly offered to lease the engine, but, not wanting it (R., 37), always made effort to *sell* same to the United States, and to collect therefor not the value of the use but the balance of the purchase price.

The finding of the court on this point was that it was "represented to the plaintiff that if said property were left in the defendant's possession its attor-

ney would *recommend* payment by the defendant therefor." (R., 19.) Evidence adduced on this subject was as follows:

> He (Mr. Reed) said that it would only be a few days until the Government would do something about it, either surrender the engine or pay our claim. And never questioned the right that we had to our pay of *deferred payment*. (R., 35.)

The other references to this subject are found on pages 35, 37, 39, 40, 46, 49, and 55 of the record.

Certainly, from plaintiff's futile efforts to sell, no contract could be implied to pay for the use of the engine and thereafter to return it to plaintiff, the United States all the while claiming the paramount title to such use. (R., 63.)

It is evident, therefore, that there was no meeting of the minds with respect to the alleged implied contract sued upon.

> Implied contracts in fact do not arise from the denials and contentions of parties, but from their common understanding in the ordinary course of business, whereby mutual intent to contract without formal words therefor is shown. (*Knapp* v. *United States*, 46 C. Cls., 601, 643.)

There was never any promise to pay for the engine or its use nor any acts from which any such promise might be implied. The only representations and acts relied upon were those of Reed and Llewellyn, which were mere opinions or recommendations, and the alleged ratification thereof by the "Director of the United States Geological Survey, to whom the

Secretary of the Interior referred said matter, and by the chief engineer and assistant chief engineer of the Reclamation Service under the direction of said department." (R., 18.) Such ratification was, however, found by the court to be only of the "acts of said Wendell M. Reed, district engineer, in *respect* to the *possession* of said engine and appurtenances." (R., 18.) Reed's only acts were the taking possession of the engine and using same under claim of right. Neither he nor Llewellyn ever did more than say that the Government had a right to the use of the engine, and that he, Reed, would "exert all the power of the Government to retain it" (R., 35), and that "he (Llewellyn) and Mr. Reed both said that they *thought* our claim was just and would like to see us get our money" (R., 39), and that he, Llewellyn, would "recommend" (R., 19) that the Government pay for same. The only acts of ratification shown were opinions in letters from the Department of the Interior concurring in Mr. Reed's view of the law, which was as follows:

> I took the position that being the agent of the United States my actions would be wholly controlled by the terms of the contract between the United States and the Taylor-Moore Construction Company. (R., 61-62.)
>
> I believe that the Government had a perfect right under the contract to retain and use this engine as well as all other equipment formerly in possession of the construction company for the completion of the work embraced in its contract. (R., 63.)

The evidence showing adoption of such opinion is found on pages 47, 50, and 55 of the record. It will be borne in mind, also, that the court found that the said officers of the Government only "ratified and adopted the acts of said Wendell M. Reed, district engineer, in respect to the possession of said engine and appurtenances." (R., 18.)

Furthermore, plaintiff was not deceived or misled by any of the Government officers, being always informed of their contentions and acting under advice of counsel, but preferred to leave the engine with the Government officers, hoping that some adjustment of the matter might be made, not, however, relying upon any promise, but only "in expectation" (R., 19) of inducing the Department to pay for it. It is evident, therefore, that Reed and Llewellyn did nothing which could be construed to be an implied promise to pay for the engine or its use; that they neither had nor claimed authority to make such contract, always referring plaintiff to some higher authority, and therefore could not impliedly do so, and that there was no ratification by anyone in authority of any acts from which a contract to pay for the use of the engine might be implied.

## III.

### It was not Shown that there was Any Fund Out of Which Judgment Might be Legally Paid.

Congress provided that moneys for reclamation work should be derived exclusively from a certain fund, and the Department of the Interior was only

authorized to make contracts for such work when said fund was sufficient to pay therefor. (Act approved June 17, 1902; 32 Stat. L., c. 1093, pp. 388 and 389; act approved Mar. 3, 1905; 33 Stat. L., c. 1459, p. 1032.)

No officer of the Government, however high in rank, had authority to make a valid contract to pay plaintiff's claim unless the special fund provided by Congress therefor was sufficient to cover same. (*Hooe* v. *United States*, 218 U. S., 322.)

It was an essential part of plaintiff's case to show that the said special fund was sufficient to pay its claim, and having adduced no evidence upon this subject, plaintiff failed to establish a material part of its case, and therefore can not recover in this action.

## IV.

**The Engine Having Been Taken Under a Claim of Right, and not in Recognition of a Paramount Title in Plaintiff, no Action Upon an Implied Contract Will Lie.**

The said engine was held and used by officers of the United States under color of right by virtue of their contract with the construction company. They never admitted or recognized a paramount title or right to possession in plaintiff. Whenever the subject arose, they always contended that the United States had superior right to the use of the engine.

Whether this claim was or was not well founded in law is immaterial. It was persistently made and acted upon by said officers of the Government. This

being true, there was no exercise of the governmental, as distinguished from the proprietary, right of the Government.

As was well said by Judge Noyes, in his dissenting opinion written in this case:

> There is a clear distinction between a governmental and a proprietary right. When the United States in the exercise of their sovereign authority appropriate private property, the Constitution guarantees compensation and the law implies a promise to pay, upon which the owner, waiving formal condemnation proceedings, may sue. But when the Government uses property because it claims a title or interest in it, it asserts a proprietary right. If this be asserted wrongfully—if the officers of the Government take possession of property in which it has no interest—a tort is committed, but there can be no implication that the Government promises to pay for a thing which it claims to be entitled to without paying. (R., 89–90.)

Whenever the United States in the exercise of their sovereign power take property whose title is undisputed, the owner may waive the formality of condemnation or other proceedings and sue upon an implied contract to pay for the property, and this is the extent of the ruling in the cases relied upon by plaintiff (*Hill* v. *United States*, 149 U. S., 593, 599); but when the Government appropriates property, or its use, to which it claims title or the right to use same, there can be no implied

promise to pay therefor; and if such claim is unfounded in law, the taking is tortious, either with respect to the United States or their officers, and the injured owner can not waive the tort and sue upon an implied contract. His remedy lies not in an application to the courts, but to Congress.

> These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interest. In such cases where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims. (*Gibbons* v. *United States*, 8 Wall., 269, 275.)

> It is a very different matter where the Government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the Government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals. It is conceded that no contract for use and occupation would, in that case, be implied. (*Langford* v. *United States*, 101 U. S., p. 341, 344.)

*Hill* v. *United States*, 149 U. S., 593.

The case at bar falls clearly within the doctrine of the decisions quoted, and therefore there can be no recovery in this case, and same should have been dismissed by the trial court for want of jurisdiction.

Respectfully,

E. MARVIN UNDERWOOD,
*Assistant Attorney General.*

MARCH, 1914.

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# Supreme Court

## of the United States

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THE UNITED STATES OF AMERICA,
*Plaintiff in Error,*
(Defendant below),
against
BUFFALO PITTS COMPANY,
*Defendant in Error,*
(Plaintiff below).

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## BRIEF FOR DEFENDANT IN ERROR

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# Supreme Court of the United States

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THE UNITED STATES OF AMERICA,
*Plaintiff in Error,*
(Defendant below),
against
BUFFALO PITTS COMPANY,
*Defendant in Error,*
(Plaintiff below).

## Brief For Defendant In Error.

This case comes to this court upon a writ of error to the Circuit Court of Appeals for the Second Circuit procured by the defendant United States of America to review a judgment dated February 8, 1912, modifying and affirming a judgment of the Circuit Court for the Western District of New York in favor of the plaintiff Buffalo Pitts Company for $1,558.65, entered on the 28th day of February, 1911.

The action was brought under the Tucker Act, (Act March 3, 1887, C. 359, 24 Stat. 505) by which the Court of Claims was given jurisdiction of all claims founded "upon any contract, express or "implied, with the Government of the United "States, or for damages, liquidated or unliqui- "dated, in cases not sounding in tort, in respect of "which claims the party would be entitled to re-

"dress against the United States either in a "court of law, equity or admiralty if the United "States were suable," (section 1). The Circuit Court was given concurrent jurisdiction "where "the amount of such claim exceeds one thousand "dollars and does not exceed ten thousand dol- "lars," (section 2).

This action is brought upon a contract with the Government of the United States implied by law from the following facts:

## STATEMENT OF FACTS.

Prior to the 20th day of May, 1905, the Buffalo Pitts Company manufactured at Buffalo, N. Y., a 22 horse-power special traction engine with the usual appurtenances and equipment, which on that day it delivered to the Taylor-Moore Construction Company at or near the town of Roswell, in the County of Chaves, and Territory of New Mexico, under an agreement of sale and at the same time the Taylor-Moore Construction Company executed and delivered to the Buffalo Pitts Company a chattel mortgage of the property for $1600, (Plaintiff's Exhibit 1, p. 28) which was duly filed for record by the Recorder of said Chaves county, May 22, 1905, at 9:30 A. M. (Fol. 127).

The Construction Company in and by said chattel mortgage did "grant, bargain, sell and "mortgage unto the said mortgagee, its suc- "cessors and assigns, all that certain personal "property, etc., to have and to hold all and sin- "gular the personal property aforesaid, forever,

"as security for the payment of the notes and "obligation hereinafter described." etc., (Fols. 112-114), the said notes bearing even date with the mortgage and maturing monthly thereafter, the first one falling due June 20, 1905, (Fol. 115).

The mortgage contained these further conditions (italics by the present writer):

"But if default shall be made in the payment "of said sum of money or the interest thereon, at "the time the said notes shall become due, or *if "any attempt shall be made to dispose of* or in- "jure said property or to remove said property "from said County of Chaves, or any part there- "of, *by said Mortgagor or any other person,* or "if said Mortgagor does not take proper care of "said property, or *if said Mortgagee shall at any "time deem itself unsafe or insecure,* then the "whole amount of said money in said notes men- "tioned which shall not have been paid, shall be "*considered immediately due and payable,* and "the said party of the second part, its successors "or assigns, shall have the right and be entitled "to declare all of said notes due and payable, "anything in said notes to the contrary notwith- "standing, and then, thereupon and thereafter, it "shall be lawful, and the said Mortgagor hereby "authorize said Mortgagee, its successors or as- "signs, or its or their authorized agent, *to take "said property and enter on the premises where- "ever the same be found, to take and remove the "same, and hold or sell and dispose of the same* "and all equity of redemption at public auction, "with notice as provided by law," etc., (Fols. 117-120).

The Taylor-Moore Construction Co. had a contract with the Government to build the Hondo Dam in connection with the irrigation work known as the Hondo Project, and the engine was to be used in this work. In scarcely more than a fortnight after the engine was purchased, and on or about June 5, 1905, the Government suspended the operations of the Construction Company upon said work and took possession of said engine and its appurtenances, (Fols. 131-132). On June 7, 1905, the Construction Company assigned to the United States all its interest in its contract (Fol. 207).

About this time the Pitts Company was informed that the Construction Company had failed financially, and thereupon instructed George Hockenhull, of Gainesville, Texas, a travelling salesman and collector, to go to Roswell, New Mexico, to see what could be done about collecting its claim. He arrived at Roswell, June 15, 1905. The next day he called at the office of W. M. Reed, District Engineer, who had charge of the Government work there, and had a talk with him, (Fols. 134-135).

They discussed the chattel mortgage, of which Hockenhull had a copy with him, and the Government contract, of which Reed had a copy. "I "said to him that I had been sent out there to "take possession of the engine if I could not get "pay for it. I said to him, 'Mr. Reed, what would "you do if I should take legal proceedings to get "possession of the engine?' Mr. Reed said, 'I "would be bound to exert all the power of the "Government to retain it.' I said I had made up

"my mind it was foolish for us to commence a "litigation at that time at least. He said that it "would only be a few days until the Government "would do something about it, either surrender "the engine or pay our claim. And never ques- "tioned the right that we had to our pay, of de- "ferred payment. At that time he said this, that "he thought it would only be a few days until "they would do something about it; that they "had no idea of giving it up. He made no positive "promise but he thought it would only be a few "days until the Government would instruct him "to settle with us and retain the engine. They "seemed to think it was necessary on the works "and did not care to give it up," (Fols. 137-140).

Mr. Hockenhull made a report to the Pitts Company of his journey to Roswell and the result of his interview, (Fol. 141).

Thereupon Mr. John B. Olmsted, the secretary and attorney of the Pitts Company, wrote a letter to the Secretary of the Interior, dated June 30, 1905, reciting the facts and saying:

"We desire to state our position to you in "order to have it properly understood. We un- "derstand that the engine above referred to is "necessary to the work, and if the work is con- "tinued by the Government, will probably be "used by it in the future. Under the terms of "our mortgage, we suppose that we are entitled "to the possession of our property, but we have "of course no objections to leaving it on the "work, provided reasonable assurance of ulti- "mate settlement for it can be given.

"Will you kindly advise us what, if anything, "more is necessary for us to do in the premises, "and indicate, if possible, the action of the Gov- "ernment in connection with our claim above "set forth. We have a certified copy of our chat- "tel mortgage, and can submit it if it is neces- "sary," (Fols. 179-181).

This letter was referred by the Secretary of the Interior to the Acting Director of the U. S. Geological Survey, whose reply, dated August 2, 1905, was read in evidence, (Fols. 182-187). In this it was claimed that the United States was entitled to the possession of the engine "under "the terms of the contract," and reference was made to the Act of Congress approved February 24, 1905, (33 Stat. 811), which related only to "labor and materials." (See decision of this court, U. S. v. Conkling, 135 Fed. Rep. 508, 68 C. C. A. 220).

The Pitts Company replied August 22, 1905, showing that the statute did not apply to the case, and saying:

"We trust you understand our position in the "matter, which is that we do not care to allow "the engine to continue to be used and to take "our chances of the small percentage that is "likely to be paid to the creditors of the Taylor- "Moore Construction Co. May we ask that you "will advise us what we may expect?" (Fols. 192-193).

The Government replied August 30, 1905, "that "the matter has been referred to the Engineer in

"the field for a statement, on receipt of which "you will be further advised." (Fol. 197).

After the receipt of this letter Hockenhull was again sent to Roswell. He arrived there September 20 or 21, 1905, and remained until October, 1905, (Fols. 142, 160). He testified as follows:

"On this second trip I saw Wendell M. Reed, "the District Engineer. I saw him nearly every "day. I was up in his office. I saw him several "times. We talked the matter over every time "I would meet him. Mr. Reed could do nothing. "He said the matter was in just the same shape "as when I had been there before in June. He "still thought the Government would pay for the "engine. I finally decided to go back to Dallas "or take some legal steps to do something about "it and I consulted with some attorneys there. "They told me the same thing that Mr. Reed had. "They said that if we undertook to take the en- "gine we would have to give a bond for twice "the amount of our claim and the Government "would turn around and take it away from us "again and go ahead. We would not be in any "better condition at all than we were at the pres- "ent time. Mr. Reid told me this and the attor- "neys I consulted confirmed it. It was Richard- "son, Reed and Harvey, I think the name of the "law firm. They said the same thing, that that "would be the condition we would get into if we "tried to take the engine away from the Govern- "ment. I talked with Mr. Reed about how we "were going to get our pay eventually; that was "what I was after; trying to get the thing set- "tled, trying to get the money for the Buffalo "Pitts people. We did not care for the engine;

"we didn't want the engine really, but we, of "course, as a last resort, consented to take it "under the terms of the mortgage. The lawyers "advised me that I was taking exactly the right "course in doing what I did, not to try to pile "up more expense because it would be useless. "That was their decision, and just make a lot of "expense and be still in the same position that "we were. The Government at that time was "prosecuting the work on the Hondo Project. "The engine was being used on the work," (Fols. 143-147).

Hockenhull was about to leave Roswell, when Reed asked him to wait a few days for the arrival of W. H. H. Llewellyn, United States District Attorney for the Territory of New Mexico, who was expected there in two or three days. Hockenhull waited and met the Government's attorney and enigneer at the latter's office, (Fols. 150-151).

"I asked Mr. Llewellyn what he thought would "be the outcome of the thing; whether he thought "there was any prospect of the Government to "pay for the engine or not, and he and Mr. Reed "both said that they thought our claim was just "and would like to see us get our money; and "then the Judge (Llewellyn) suggested that he "would write a letter to the Department that day "suggesting a settlement, and later on the same "day read me a copy of his letter.

"Plaintiff offered and read in evidence the fol-"lowing extract from the letter of W. H. H. Llew-

"ellyn to the Attorney General, dated Roswell, "New Mexico, September 30, 1905:

> " 'In this connection I desire to call your attention to the fact that the Buffalo Pitts Mfg. Co. furnished the Taylor-Moore Construction Co. with a traction engine of the value of $1,600, giving said Buffalo Pitts Mfg. Co. a chattel mortgage on same. The reclamation engineers are using this engine. The Buffalo Pitts Company desire either to have the engine or make some arrangement whereby they may be paid for this sale, and *the question is in the event of their attempting to replevy same and take it from the possession of the engineers, whether I should resist it or not. I take it that there could be a redelivery to the engineers and under Section 1001 R. S. would not be required to give a bond, and could probably keep possession of the engine for some time and thus enable the engineers to complete the reservoir in question. But would not this subject the Government to a suit which would result eventually in the Government having to pay for the engine. I will thank you to advise me what in your opinion would be the correct position for me to take on the question'.*" (Fols. 153-158). . .

Hockenhull reported these interviews to the Pitts Company. He waited at Roswell several days for a reply from the Government, but never got any and left, (Fols. 160-161).

While he was there, the Pitts Company received another letter from the Chief Engineer of the

Reclamation Service under the Department of the Interior, dated September 26, 1905, claiming possession of the engine under the terms of the contract with the Construction Company, and alleging "that the engine was furnished and was in "use upon the work before any instrument was "filed showing title in any one other than the "contractors," (Fol. 201). This allegation was consistent with the fact that the engine was sold on or before May 20, 1905, the date of acknowledgment of the chattel mortgage (Fol. 126), and that the instrument was filed May 22, 1905, at 9:30 A. M., (Fol. 127), and was not inconsistent with the right, title and interest of the Pitts Company under the mortgage.

This letter further said: "The status of the "machinery in question is the same as that of "other machinery, tools, stock, etc., belonging to "the contractors and taken over by the govern- "ment in pursuance of the express terms of the "contract, and *until the work is completed and "matters under the contract are finally adjusted*, "no change in the status of the machinery can "be made nor claims thereto recognized," (Fols. 203-204).

It will be noted that the Government only claimed to hold the engine "until the work is "completed and matters under the contract are "finally adjusted," and it was a claim to "the "machinery" and not to just compensation therefor which the Government refused to recognize. The fair inference was that when the work was completed the matters under the contract would be finally adjusted, including the Pitts Company's

claim. The reports subsequently received from Hockenhull confirmed this expectation.

The foregoing correspondence proves that the retention and use of the engine by the Government was authorized by the Department of the Interior, which was fully empowered by the Reclamation Act, hereinafter cited, to take any property it needed. Under this authority the engine was retained and used by the Government until June 21, 1906, when the work was finished, (Fol. 208).

After that the engine appears to have been abandoned. It was found by the Pitts Company standing out on the open ground near the Hondo Dam. It was badly eaten with rust and had been robbed of its parts until nothing much was left but the wheels and boiler. In 1906, what was left of it, was not worth more than $350, (Fols. 218-219, 227-228).

The purchase price of the engine was $1820. That was the price at Houston, Texas, and the freight was to be added to that, to put it in New Mexico, (Fol. 212). The Pitts Company received a down payment of $145, and $75 was allowed to the Construction Company for freight charges (from Buffalo to Houston), (Fol. 214). No part of the balance of $1600 secured by the chattel mortgage was ever paid, (Fol. 210).

An arrangement was made at Washington in April, 1907, between Mr. Olmsted, representing the Pitts Company, and Mr. Morris Bien of the Reclamation Service, representing the Depart-

ment of the Interior, to determine the fair value of the use of the engine, if the Government should pay for it at all, (Fol. 212). The value of the engine when it was put on the work less its appraised value when the Government got through with it was to be taken as reasonably approximate compensation, if any. An appraisal was made accordingly (Fols. 213-214), and the value of the engine at the time of appraisal was fixed at $500, (Fol. 222).

The Government refused to pay any part of the claim and this action was brought. Other facts are found in the decision of the Court (Findings, Fols. 56-57).

## POINT I.

*THE BUFFALO PITTS COMPANY WAS THE LAWFUL OWNER OF THE ENGINE AND BECAME ENTITLED TO POSSESSION OF IT AS SOON AS THE MORTGAGOR ATTEMPTED TO DISPOSE OF IT TO THE GOVERNMENT, UNLESS THE GOVERNMENT EXERCISED THE RIGHT OF EMINENT DOMAIN.*

As the manufacturer and vendor of the engine, the Pitts Company was the general and absolute owner of the property, with the legal title and right to immediate possession, excepting only as the latter was modified by the transaction of sale and mortgage. The legal title was not altered by this transaction, for simultaneously with the implied transfer of the title to the mortgagor it was expressly reconveyed to the mortgagee by

the words "grant, bargain, sell and mortgage "unto the said mortgagee, its successors and as- "signs" (Fol. 112).

A mortgage of chattel conveys the legal title to the mortgagee, and is not merely a security as in the case of real estate.

Jones, on Chattel Mortgages, section 1, states the matter as follows:

"A formal mortgage of personal property is a "conditional sale of it as security for the pay- "ment of a debt or the performance of some other "obligation. The condition is that the sale shall "be void upon the performance of the condition "named. If the condition be not performed ac- "cording to its terms, the thing mortgaged is ir- "redeemable at law, though there may be a re- "demption in equity, or by force of statute.

"Such a mortgage is something more than a "mere security. It is a conditional sale of chat- "tels, and *operates to transfer the legal title to "the mortgagee,* to be defeated only by a full per- "formance of the condition. Upon breach of the "condition the mortgagee may take possession of "the property, and, so far as the legal rights of "the parties are concerned, he may thenceforth "treat it as his own; he may sell it or give it "away; squander it or destroy it.

"In this respect a mortgage of personal prop- "erty is like a mortgage of real estate under the "old common law, but differs widely from a mort- "gage of real estate, as the latter has gradually "come to be viewed within the past half century

"in nearly half the states and territories of the "United States; for while in these states such a "mortgage is regarded as conferring no legal "title upon the mortgagee, but as being a mere "lien or security, in these same states almost "without exception, and everywhere else, a mort- "gage of personal property is regarded as not "being a mere security, but as passing the legal "title, which becomes absolute in the mortgagee "upon default."

In Conrad v. Atlantic Insurance Co., 26 U. S. 386, (7 Lawyers Ed. 189), the Supreme Court in a very important case argued by the most eminent counsel, in which Mr. Justice Story wrote the opinion, upheld the principles upon which the defendant in error here relies. In that case the Atlantic Insurance Company claimed title under a mortgage of personal property and the United States claimed priority under executions in its favor levied upon the property by Conard, as United States marshal. The mortgage was held to be a conveyance that divested the priority. The Court said at page 441:

"It is true, that in discussions in Courts of "Equity, a mortgage is sometimes called a lien "for a debt. And so it certainly is, and something "more; it is a transfer of the property itself, as "security for the debt. This must be admitted "to be true at law, and it is equally true in equity. "for in this respect equity follows the law. It "does not consider the estate of the mortgagee as "defeated and reduced to a mere lien, but it "treats it as a trust estate, and according to the "intention of the parties, as a qualified estate and

"security. When the debt is discharged there is "a resulting trust for the mortgagor. It is there- "fore only in a loose and general sense that it is "sometimes called a lien, and then only by way "of contrast to an estate absolute and indefeas- "ible."

The New York Court of Appeals stated the common law of chattel mortgages as follows:

"The execution of a chattel mortgage, in the "usual form, invests the title in the mortgagee, "subject to be defeated by subsequent perform- "ance of the condition.

"The right of possession ordinarily follows "that of property; and both would pass under "such an instrument, in the absence of any ex- "press or implied agreement for the retention of "the chattels by the mortgagor.

"But when the instrument specifically defines "the circumstances under which the right of pos- "session is to vest in the mortgagee, the law im- "plies an intent that it is to remain meantime in "the mortgagor."

Hall v. Sampson, 35 N. Y. 274.

"As a general rule, the right of possession fol- "lows the right of property; and, therefore, "where there is no restraining stipulation, the "mortgagee having the right of property, until "defeated by the performance of the condition, "has as incident thereto the right of possession, "and may therefore take the goods into his own "custody, or maintain trespass or trover for

"them, against any one who takes or converts "them to his own use."

Coles v. Clark, 3 Cush. 399, 402, per Chief Justice Shaw.

The Government offered in evidence Chapter 1, Title 27, of the Laws of New Mexico, (Fol. 252) but it omitted the most important sections.

Chapter 1, Title 27, of the Laws of New Mexico, section 2370, provides as follows:

"Any person having conveyed to another any "personal property by chattel mortgage or other "instrument of writing having the effect of a "mortgage or lien upon such property, who dur- "ing the existence of such mortgage or lien shall "sell, transfer, conceal, take, drive or carry away, "*or in any manner dispose of such property or* "*any part thereof, or cause or suffer the same to* "*be done, without the written consent of the* "*holder of such mortgage or lien, shall be guilty* "*of a misdemeanor*, and on conviction may be "fined in a sum not exceeding twice the value of "the property so sold or disposed of, or confined "in the county jail not exceeding six months, or "both, at the discretion of the Court."

The Supreme Court of New Mexico has construed this section in connection with section 2365 and the other sections cited by the Government (Fol. 252), in Kitchen v. Shuster, 14 N. M. 164, 89 Pac. Rep. 261, decided in 1907. This was a replevin action to recover possession of 103 head of steers. One George E. Staring with the plaintiff Kitchen as accommodation maker, executed and

delivered to one Morris a promissory note for $1700 with interest. To indemnify himself Kitchen took from Staring a bill of sale covering the cattle in question conditioned to be null and void upon payment of the note, otherwise to remain in full force. Staring retained possession of the steers and a month later made an absolute sale to the defendant Shuster for a consideration of $1775. Shuster took possession, and Kitchen brought replevin. The plaintiff had a verdict and the Supreme Court held the law in his favor as stated in the following syllabus, but reversed the judgment on a question of evidence as to whether defendant had notice of the plaintiff's mortgage, which was not recorded until after the sale to the defendant.

The syllabus of the Court, so far as relevant here, was as follows:

1. At common law the mortgagee in a chattel mortgage is entitled to the possession of the property mortgaged, but this has been changed in this territory by C. L. 2365, which *in the absence of any agreement to the contrary* gives the right of possession to the mortgagor until divested thereof *by operation of law or by breach of the terms of the mortgage.*

2. By C. L. Sec. 2370 the mortgagor is penally prohibited from selling the chattels mortgaged without the written consent of the mortgagee and *this statutory provision is to be read into the mortgage as a condition thereof to the same extent as if embodied therein in so many words.*

3. A breach of this statutory condition gives the mortgagee the right to sell the property under Sec. 2367, which provides that upon condition broken the mortgagee may proceed to sell the mortgaged property to satisfy the mortgage.

4. *The right to sell includes the right to possess and thus the right to maintain replevin to recover the possession.*

The same Court in First National Bank of Roswell v. Stewart, 13 N. M. 551, held that a chattel mortgagee could sustain replevin against an execution levied upon the mortgaged goods while still in possession of the mortgagor. From this decision it necessarily follows that the Pitts Company had the right of possession to the engine as claimed by it, unless the Government had the superior right of eminent domain, as hereinafter stated.

The conditions contained in the Pitts Company's mortgage are substantially the same as those stated in the statute, section 2370, above.

The attempt of the Construction Company to dispose of the mortgaged engine to the United States was a fatal breach of the conditions upon which its right to possession depended and a direct violation of the penal law.

"The Taylor-Moore Construction Co. assigned "to the United States their interest in their con- "tract on the Hondo Project, on June 7, 1905, and "the United States on that date took charge of all "material, supplies and equipment belonging to

"them," (Fols. 207-208) including the mortgaged engine and appurtenances, (Fols. 132-133). On or about June 5, 1905, the United States had suspended the operations of the Construction Company (Fol. 245), which forfeited its contract, (Fol. 241). The company failed financially and left Roswell, (Fols. 135, 161).

This was exactly such a situation as the chattel mortgage and statute were intended to provide against. The statute forbade the mortgagor to dispose of the property in any manner, "or to "cause or suffer the same to be done." The Government had notice of this provision and was bound by it as well as the Construction Company. The provision was self-executing. As soon as the attempted disposition was made the right of possession on the part of the Construction Company ceased and passed to the Pitts Company.

This construction is not only fair and reasonable but necessary, for otherwise legitimate business would be deprived of protection. The Pitts Company could not afford to ship a new engine to a distant point upon a small cash payment, unless it had the right to immediate possession under the circumstances stated. If the Government thereafter exercised the right of eminent domain under its contract and section 7 of the Reclamation Act, hereinafter cited, it was obliged to make just compensation. The United States is therefore answerable to the Pitts Company for the use and possession of the engine which it enjoyed. The Pitts Company as soon as possible, on June 16, 1905, fully and actually notified the Government of its rights, of which the engineer

in charge seems to have had previous knowledge, (Fols. 135-136).

Kitchen v. Shuster, above, holds that the demand of possession which was made, was unnecessary.

## POINT II.

### *THE UNITED STATES IS BOUND TO PAY THE BUFFALO PITTS COMPANY FOR DEVOTING ITS PROPERTY TO PUBLIC USE.*

This follows from the admissions contained in the Government's answer:

"1. Admits that the Buffalo Pitts Company, "the plaintiff herein, is organized and has its "place of business as in said petition set forth; "that the Taylor-Moore Construction Company "had a certain contract with the United States of "America, the defendant herein, through its De- "partment of Interior, for certain reclamation "work in the Territory of New Mexico; that on or "about June 7th, 1905, *the United States of Amer- "ica* suspended the Taylor-Moore Construction "Company from work on and under such contract "and *took possession of* all supplies, materials "and equipments of said Company then on said "work, including *the so-called Buffalo Pitts' en- "gine* mentioned in said petition, pursuant to the "provisions of the contract aforesaid and there- "upon and thereafter completed the work there- "under, by and with the use, aid and assistance of "the said supplies, materials and equipments, in- "cluding the said engine." The remainder of the answer is merely a denial of knowledge or infor-

mation sufficient to form a belief as to the facts not admitted, (Fols. 46-48.)

The contract under which this justification is alleged is not in evidence. The most definite evidence of its contents is that contained in two letters from the Department of the Interior. One said:

"Under the terms of said contract, in case of "default by the contractor the United States is "entitled to the possession of the *contractor's* "*machinery* delivered on the ground and if the "engine referred to was delivered, the United "States has taken possession of it under the "terms of the said contract," (Fol. 186).

The other said:

"Upon default of the contractors, the Govern- "ment under the terms of the contract which was "in force at the time the chattel mortgage is said "to have been filed, took possession of all the "machinery, tools and appliances *belonging to* "*the contractor,* upon the ground," (Fol. 202).

It appears, therefore, that the Government asserted in its contract a right in case of the contractor's default, to take over any machinery delivered to him upon the ground, regardless of title, and to use it until the completion of the work.

That was an assertion of the right of eminent domain as to any property which the contractor was not entitled to hold against the true owner. It appears to have been a lawful exercise of that power, and the Government engineer in the field

appears to have been correct in saying: "I be-
"lieve that the Government had a perfect right
"under the contract to retain and use this engine
"as well as all other equipment formerly in pos-
"session of the Construction Company for the
"completion of the work embraced in its con-
"tract," (Fol. 251).

This right was, however, subject to the limitation imposed by the Fifth Amendment of the Constitution: "Nor shall private property be "taken for public use without just compensa-"tion."

The Reclamation Act of June 17, 1902, 32 Stat. 388, 4 Comp. Stat. 666, under which the contract was let provides in section 7, "that where in carry-"ing out the provisions of this act it becomes nec-"essary to acquire *any rights* or property, the "Secretary of the Interior is hereby authorized "to acquire the same for the United States by "purchase or by condemnation under judicial "process, and to pay from the reclamation fund "the sums which may be needed for that pur-"pose."

The exact wording of the contract is immaterial. The acts of the Government are clearly proved and these determine its responsibility, regardless of the contract. The statute conferred the right of eminent domain, and the Government exercised it directly and immediately by taking and holding the plaintiff's property. No statute of the United States or of the Territory of New Mexico providing any method of procedure for condemning personal property can be found. The

case falls within the general grant of jurisdiction made to the Federal Courts by the Judiciary Act of 1789.

Kohl v. U. S., 91 U. S. 367, 23 L. ed. 449.

See Lewis on Eminent Domain, §§413, 513-514, and cases cited.

The right of the Government to take the engine in question for use until the work was completed, is evidently included in the right to appropriate the property absolutely. The only person who could object thereto was the plaintiff, which has not raised such an objection. After the Government was through with the engine, the plaintiff took possession of it and agreed with officers of the Government as to the proper measure of damages, in case it was entitled to damages, (Fols. 212-223).

Both in law and equity the right, title and interest of the plaintiff in and to the engine was prior and superior to any claim on the part of the Government, except the right of eminent domain. The Government took the engine *cum onere,* subject to the chattel mortgage previously and duly filed.

"The supposition that the Government will not "do justice is not to be indulged."

Gibbons v. U. S., 8 Wall. 269, 19 L. ed. 453.

Its action was the exercise of a governmental right. Only a sovereign power would assume such a right as was asserted by the United States

in this case. In order to complete a public work it commandeered all the machinery found upon the ground in the contractor's possession, upon his default. It did not claim that the contractor's machinery thereby became its property, and it did not claim title to the engine in question. It simply claimed the right to take and use it. The right of the plaintiff to payment was not disputed, (Fols. 138-139, 149, 153-158). The view of this matter taken by the majority of the Circuit Court of Appeals was clearly correct, and the dissenting opinion concedes that if this is the fact, there is no reason for dissent, (page 90). The learned judge assumes that the Government's employees claimed a proprietary right in the engine. In this he goes beyond the evidence. They claimed that the engine came under the contract and therefore that they could hold and use it, but whether this was a governmental or proprietary right, the employees did not attempt to say or to inquire. A governmental right was lawful because it allowed just compensation to be made. A proprietary right did not exist and was without any foundation in fact.

"Very different from this proprietary right of "the Government in respect to property which it "owns is its governmental right to appropriate the "property of individuals. All private property "is held subject to the necessities of government. "The right of eminent domain underlies all such "rights of property. The Government may take "*personal or real property* whenever its neces- "sities, or the exigencies of the occasion, de- "mand. So, the contention that the Government "had a paramount right to appropriate this

"property may be conceded, but the Constitution "in the 5th Amendment guarantees that when this "governmental right of appropriation—this as- "serted paramount right—is exercised it shall "be attended by compensation."

U. S. v. Lynch, 188 U. S. 445, 465, 47 L. ed. 546.

## POINT III.

*THE LAW IMPLIES A CONTRACT THAT THE UNITED STATES WILL PAY THE BUFFALO PITTS COMPANY JUST COMPENSATION.*

"In such case, the party makes no promise on "the subject; but the law 'consulting the inter- "'ests of morality' implies one; and the liability "thus arising is said to be a liability upon an im- "plied contract."

Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450, 45, Book 17 Lawyers Ed. p. 805, 807.

"Implied contracts are such as reason and "justice dictate, and which, therefore, the law pre- "sumes that every man undertakes to perform."

1 Parsons, Contr. p. 5.

"Contracts implied in law are legal fictions "adopted for the purpose of enforcing legal "duties by actions *ex contractu*, where no actual "contract exists, either express or implied. In "the case of a contract implied in law, the inten- "tion is disregarded."

15 Am. & Eng. Enc. Law, p. 1078.

There is an implied contract on the part of the Government to pay compensation where it takes private property.

Pumpelly v. Green Bay & M. Canal Co., 13 Wall. 166, 20 L. ed. 557, 560.

U. S. v. Jones, 109 U. S. 513, 27 L. ed. 1015.

U. S. v. Great Falls Mfg. Co., 112 U. S. 645, 28 L. ed. 846.

Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 28 L. ed. 901.

U. S. v. Palmer, 128 U. S. 262, 32 L. ed. 442.

U. S. v. Berdan Fire Arms Mfg., Co., 15 U. S. 552, 39 L. ed. 530.

Dooley v. U. S., 182 U. S. 222, 45 L. ed. 1074.

U. S. v. Lynch, 188 U. S. 445, 47 L. ed. 539.

U. S. Cornell Steamboat Co., 202 U. S. 184, 50 L. ed. 987.

The first three of the cases cited relate to the taking of real estate, the second three to the use of patented inventions, and the last three respectively to custom duties illegally exacted, the destruction of a rice plantation, and salvage of dutiable goods.

The present case is clearly within the principles established in the cases cited.

U. S. v. Palmer, 13 Wall. 623, 20 L. ed. 474, was a case, in which three steamboats were impressed into the public service on the ground of military necessity, and after being used for various

periods were returned to the owner. Certain payments for the services were made to him, but he claimed a larger sum. He recovered a judgment upon an implied contract which the Supreme Court affirmed. In its general features the case is analogous to the present case.

The cases cited in the Government's brief to show that to constitute an implied contract in this case there must have been a meeting of the minds of the parties, are not in point. Hill v. United States, 149 U. S. 598, was an action to recover damages against the Government for the use and occupation of land for a light-house. The land in question was under the tidewaters of Chesapeake bay, and the United States claimed a paramount right to the use thereof for a light-house without making any compensation therefor. This court dismissed the suit for want of jurisdiction, on the ground that it did not come within the provisions of the Tucker Act. In this case the title of the plaintiff to the land in question was disputed, and the rule in Langford v. U. S., 101 U. S. 341, was applied. The other case cited by the Government, Harley v. U. S., 198 U. S. 229, was an action by a Government employee which sought compensation for the use by the United States of a patented device, brought after fourteen years' delay in presenting the claim. As expressed in the findings of fact, "it was sup-"posed and understood by the Secretary and "Chief of the Bureau that the claimant being an "employee of the Treasury Department, would "neither expect nor demand compensation." The principles applicable to such an action do not apply to the present action.

The Government also cites Langford v. U. S., 101 U. S. 341, but as pointed out above the claimant's title in that case was disputed, and if the claimant's allegations were true, the Government was guilty of a tort. Gibbons v. U. S., 8 Wall, 275, involved the tortious conduct of a Government quartermaster. Knapp v. U. S., 46 C. of C. 601, was an action by officers of the U. S. navy assigned to duty in the Bureau of Ordinance to recover compensation for a patented device invented by them while engaged in such duty. Held, that a presumption of implied contract did not arise. All such cases are foreign to the present argument.

The Government also cites, Hooe v. United States, 218 U. S. 322, 31 Supreme Court Reporter 85. The owners of a building in Washington occupied by the Civil Service Commission under a lease made by the Secretary of the Interior had received the entire sums which Congress had appropriated from year to year as full compensation for the rent of said quarters. Without the owners' consent the Commission used the basement which was not included in the lease. The owners made a claim under the Tucker Act for the difference between the rents received and the fair rental value of the building including the basement. The Revised Statutes prohibited any department from expending any sum in excess of its appropriations, and a special statute prohibited contracts for the rental of property for government purposes "until an appropriation "therefor shall have been made in terms by Con-"gress," and a further statute was enacted "that

"this clause be regarded as notice to all contrac-
"tors or lessors of any such building or any part
"of building." The Secretary of the Interior had never recognized the owners' claim and they had continued to receipt for the rent in full. *Held* no cause of action. The decision is not in point upon this argument.

The Government's third point that "it was not "shown there was any fund out of which judg-"ment might be legally paid" is without force. So far as appears, the reclamation fund is ample to pay this judgment, and the Government may charge it to that fund, if it pleases. The presumption is that the fund is sufficient for the purpose. Under the Reclamation Act, section 4, the Secretary of the Interior could only let the contract which the Government's answer admits, (Fol. 46) "providing the necessary funds for such "portions or sections are available in the reclama-"tion fund, and thereupon he shall give public "notice of the lands irrigable under such pro-"ject," etc. A public officer is presumed to have done his duty. The Secretary must have certified that the necessary funds to complete the work in question, including incidental expenses like the present claim, "are available in the re-"clamation fund." That is no doubt the fact. Howbeit, the United States is generally liable. It owned the lands upon which the improvement was made, and their value was enhanced by such improvement. Having had the benefit of the plaintiff's engine to enhance its own estate, it cannot retain such benefit without making its property generally liable.

## POINT IV.

*THE JUDGMENT SHOULD BE AFFIRMED WITH COSTS.*

All of which is respectfully submitted.

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# UNITED STATES *v.* BUFFALO PITTS COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 369. Submitted May 5, 1914.—Decided June 8, 1914.

In cases brought under the Tucker Act and coming to this court from a District or Circuit Court the findings of fact of the trial court are conclusive, and the question here, unless the record would warrant the conclusion that the ultimate facts are not supported by any evidence whatever, is whether the conclusions of law are warranted by the facts found. *Chase* v. *United States*, 155 U. S. 489.

Where property is left with the officer of the Government who has charge of the work by the owner relying upon the fact that his title is not disputed and upon representations made to him that payment would be recommended for such use, and Congress has given authority to appropriate property necessary for the particular work and to pay therefor, there is an implied contract on the part of the Government to pay for the property and jurisdiction exists under the Tucker Act. *United States* v. *Lynah*, 188 U. S. 445, followed, and *Harley* v. *United States*, 198 U. S. 229, distinguished.

When in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, the United States, under the constitutional obligation of the Fifth Amendment, impliedly promises to pay therefor. *United States* v. *Lynah*, 188 U. S. 445, 464, followed. *Hooe* v. *United States*, 218 U. S. 322, distinguished.

193 Fed. Rep. 905, affirmed.

THE facts, which involve the liability of the Government under the Fifth Amendment for the rental value of property used by it, are stated in the opinion.

*Mr. Assistant Attorney General Underwood* for the United States:

The plaintiff had no such title to the engine as would enable it to contract for its use.

There was no intention to make a contract for the use of

said engine, nor conduct of the parties from which such contract might be implied.

It was not shown that there was any fund out of which judgment might be legally paid.

The engine having been taken under a claim of right, and not in recognition of a paramount title in plaintiff, no action upon an implied contract will lie. *Gibbons* v. *United States*, 8 Wall. 269, 275; *Harley* v. *United States*, 198 U. S. 229; *Hill* v. *United States*, 149 U. S. 593, 598; *Hooe* v. *United States*, 218 U. S. 322; *Knapp* v. *United States*, 46 Ct. Cls. 601, 643; *Langford* v. *United States*, 101 U. S. 341.

*Mr. Edward P. White* for defendant in error.

Mr. Justice Day delivered the opinion of the court.

This suit was brought by the Buffalo Pitts Company in the Circuit Court of the United States for the Western District of New York to recover for the value of the use of a certain engine which it was alleged the United States was under an implied contract to pay. The action was begun under the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, and the court of original jurisdiction, as required by the statute, § 7, made findings of fact and conclusions of law under which it held the Government liable and rendered judgment for the plaintiff's claim. On writ of error the Circuit Court of Appeals affirmed that judgment (193 Fed. Rep. 905), and the case is brought here.

The findings of fact show that: The plaintiff is a corporation organized under the laws of New York and having its principal place of business at Buffalo, New York, manufacturing, among other things, traction engines. On May 20, 1905, it sold a traction engine with appurtenances to the Taylor-Moore Construction Company, delivered

at Roswell, New Mexico, and took a chattel mortgage thereon to secure the payment of $1600 of the purchase price. The chattel mortgage conveyed the engine and appurtenances to the plaintiff on condition that if the mortgagor should fail to pay the sum of $1600 according to certain notes or should attempt to dispose of or injure the property or remove the same from the County of Chaves, New Mexico, or if the mortgagor should not take proper care of the property, or if the mortgagee should at any time deem itself unsafe or insecure, then the whole amount unpaid should be considered immediately due and payable and it should be lawful for the mortgagee to take the property and remove the same and hold or sell it and all equity of redemption at public auction with notice as provided by law. The mortgage was duly recorded May 22, 1905, and no part of the money thereby secured has ever been paid to the mortgagee which has ever since been the owner and holder of the mortgage. The engine was put to work by the Construction Company upon the so-called Hondo Project, being part of the Reclamation Service undertaken by the Department of the Interior of the United States, which work was being prosecuted under a contract between the United States and the Construction Company, the engine being located at or near Roswell, New Mexico.

The Construction Company having made default in the performance of its contract, on or about June 7, 1905, work was suspended thereunder and the Construction Company then assigned all its interest in the contract to the United States, which, pursuant to the contract, took possession of all material, supplies and equipment belonging to the Construction Company, including the engine and appurtenances. On June 16, 1905, at Roswell, New Mexico, the plaintiff by its agents made a demand upon the defendant through Wendell M. Reed, District Engineer of the Reclamation Service under the Department of the Interior,

for the possession of the engine and appurtenances, which the defendant then and there refused, and thereafter it retained and used the property in the work under the contract until June 21, 1906. Reed was during, and before and after, such period, the local representative of the Government in charge of the work under the contract at and near Roswell, and as such took possession of the engine and appurtenances for the United States. Thereafter the defendant by the Director of the United States Geological Survey to whom the Secretary of the Interior referred the matter, and by the Chief Engineer and Assistant Chief Engineer of the Reclamation Service under the direction of the Department, ratified and adopted the acts of Reed in respect to the possession of the engine and appurtenances. The mortgagor has never made any claim to the property since the suspension and assignment of the contract to the defendant.

Plaintiff, on or about June 16, 1905, and also on or about September 30, 1905, notified the defendant of the execution and filing of the chattel mortgage and that the plaintiff claimed the property under the title thereby vested in it and claimed the right of possession because of the default by the mortgagor in the conditions thereof, and the defendant at all times well knew of the existence and filing of the chattel mortgage and did not at any time dispute the validity thereof. On September 30, 1905, the defendant represented to the plaintiff that it was using and would continue to use the engine and appurtenances in its work and that any legal proceedings to recover the possession thereof would be resisted by the defendant, and further represented to the plaintiff that if such property was left in the defendant's possession its attorney would recommend payment therefor. The plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid and consented

to defendant's retaining possession of the property in expectation of receiving due compensation therefor.

The question in this case is, Did these facts warrant the deduction that the Government was liable upon an implied contract to pay for the use of the engine? In cases brought under this act coming up from a District or Circuit Court of the United States the findings of fact of the trial court are conclusive, and the question is whether the conclusions of law were warranted by the facts found (*Chase* v. *United States*, 155 U. S. 489, 500). Exceptions to the rule may exist if the record enables the court to conclude that the ultimate facts found are not supported by any evidence whatever (*Collier* v. *United States*, 173 U. S. 79).

We think the Circuit Court and the Circuit Court of Appeals were right in concluding that under the facts found the United States was liable upon an implied contract. As to the plaintiff, it is specifically found that it left the property with the defendant, relying upon the fact that its title to the property under the mortgage was not disputed and upon the representations made to it, and consented to the defendant's retaining possession of the property in expectation of receiving compensation for it; as to the Government it is found that it was well known to it that the chattel mortgage existed and its validity was undisputed, and that it would continue the use of the engine and appurtenances, and if left in its possession payment would be recommended for such use.

True it is that under the Tucker Act there is no jurisdiction in the Court of Claims or District Courts of the United States to recover for acts merely tortious, the statute providing that there shall be no recovery except in cases not sounding in tort. It was said in a case cited for the Government, *Harley* v. *United States*, 198 U. S. 229, that there must be some meeting of the minds of the parties upon the fact that compensation will be made. In

that case it was found that there was no demand based upon a convention between the parties or coming together of minds, for while the plaintiff, an employé of the Government in the Bureau of Printing and Engraving, supposed and understood he would be entitled to compensation for certain improvements made in printing presses which were used for many years by the Bureau, the findings also set forth in express terms that it was supposed and understood by the officers of the Government that the claimant would neither expect nor demand remuneration, and this fact, said this court, distinguished it from *McKeever* v. *United States*, 14 Ct. Cl. 396, affirmed by this court; also from *United States* v. *Lynah*, 188 U. S. 445, and the other cases cited by appellant.

In the present case, as we have said, there is nothing to show that the Government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that if the Government had the right to take the property, notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take and sell the property under the circumstances shown and which after the breach of condition vested the right of possession and the right to convert the property in the mortgagee. *Kitchen* v. *Schuster*, 14 New Mex. 164.

Furthermore, the Government was authorized by § 7 of the act of June 17, 1902, c. 1093, 32 Stat. 388, under which this improvement was being made to acquire any property necessary for the purpose and if need be to appropriate it. It may be said, as contended, that under the contract with the Construction Company the Government had a right to take possession of this engine which was in possession of the Company as mortgagor and by virtue of the terms of the agreement complete the work, but it could not in this

manner extinguish the rights of the mortgagee, nor did it undertake to do so. Under such circumstances we think the former decisions of this court, recognizing the general principles of justice which give rise to implied obligations, and enforcing the right of compensation when private property is taken for a public use, require the Government to make compensation for the use of this engine, and that the facts bring this case within *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, and *United States* v. *Lynah, supra.* In the latter case, where it was sought to recover damages for the alleged taking of the plaintiff's property in the construction of a dam which had the effect to overflow lands belonging to him and destroy their value, after an extended review of the previous cases in this court, it was said (p. 464):

"The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real

property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

(P. 465) " . . . Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

In *Hooe* v. *United States*, 218 U. S. 322, the attempt to make the Government liable for rent was in the face of a statute of the United States which provided that no contract should be made for rent until an appropriation for that purpose had been made by Congress. In the present case the Government had the right to contract for this work under statutory authority and to acquire property necessary to that end. Under the contract it might take possession of the Construction Company's property, and, it may be conceded, finish the contract with such property, but it had no right to use the property of others without compensation, and in this case it did not assume to do so. The mortgagee had a distinct right in the property which had accrued to it before the property was entered upon, and was authorized to take and hold the same as against the attempted transfer of the mortgagor. While the Government claimed the right to thus take and use the property, it nevertheless held it without denying the right of the owner to compensation. When it takes property under such circumstances for an authorized governmental use it impliedly promises to pay therefor. This accords with the principles declared in the previous cases in this court and arises because of the constitutional obligation embodied in the Fifth Amendment to the Constitution of the United

States, guaranteeing the owner of property against its appropriation for a governmental use without compensation.

We find no error in the judgment of the Circuit Court of Appeals, and it is

*Affirmed.*